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No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FRANCES X. HOPKINS, Warden,
Nebraska State Penitentiary,

Petitioner,

vs.

JOHN E. RUST,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts are free to ignore state court rules of procedure and practice in determining whether an issue was "fairly presented" in the state courts.

2. Whether the federal courts are free to ignore this petitioner's otherwise legitimate procedural default claim by employing a concession made by other counsel in an entirely separate habeas corpus proceeding involving another death-sentenced prisoner.

3. Whether due process is violated by a state appellate court, authorized to conduct de novo review of the findings of the trial level sentencing panel, determining that aggravating circumstances, found to be present by the judicial sentencing panel at trial, were in fact present beyond a reasonable doubt.

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The petitioner seeks a writ of certiorari from the opinion of the United States Court of Appeals for the Eighth Circuit filed in ***John E. Rust v. Frances X. Hopkins, Warden, Nebraska State Penitentiary***, 984 F.2d 1486 (8th Cir. 1993). (App. 1).

Two opinions were entered in this matter by the United States District Court for the District of Nebraska in unreported case #CV87-L-340. They are reprinted in the appendix at App. 135 and App. 141.

The relevant opinion of the Nebraska Supreme Court is ***State v. Rust***, 197 Neb. 528, 250 N.W.2d 867, ***cert.den.*** 434 U.S. 912 (1977).

STATEMENT OF JURISDICTION

(i)

The opinion in question was filed January 20, 1993.

(ii)

No rehearing before the United States Court of Appeals for the Eighth Circuit was sought by the petitioner nor have any extensions of time to file this petition been granted.

(iii)

The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

The Constitution of the United States, **Article XIV, Section 1.** [N]or shall any State deprive any person of life, liberty or property, without due process of law . . .

Neb. Rev. Stat. § 29-2521.03 (1989). The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522 and 29-2524.

Neb. Rev. Stat. § 29-2522 (1989). After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after

the conclusion of the appeal provided for by section 29-2525.

STATEMENT OF THE CASE

This case was initiated in the United States District Court for the District of Nebraska pursuant to 28 U.S.C. § 2254.

The respondent, John E. Rust (hereinafter "Rust"), was convicted of first degree murder and sentenced to death for the shooting death of civilian Michael Kellogg in the course of a running gun battle with Omaha, Nebraska police as Rust sought to avoid capture following an armed robbery.

Rust's sentence of death was imposed by a judicial sentencing panel in 1975, affirmed on direct appeal to the Nebraska Supreme Court in 1977, and has now been pending in the federal courts since 1987 on the respondent's first habeas corpus petition.

Question 1

The Nebraska Supreme Court first addressed the new first degree murder sentencing scheme enacted by the Nebraska Legislature in 1973 in a series of four opinions released on February 2, 1977. Rust's conviction and sentence of death was one of those four cases.

Assignments of error in an appellant's brief are the mechanism by which issues are presented to the Nebraska Supreme Court for consideration and decision. Rust did not assign as an error in his appellant's brief the

failure of his sentencing panel to articulate the standard of proof employed in reaching their determination that certain statutory aggravating circumstances were present in Rust's case. However, another defendant in that original group of four cases, Erwin Charles Simants, assigned exactly that error in his direct appeal. Only after the Simants opinion was released simultaneously with Rust's did Rust then attempt to raise the standard of proof issue by means of a motion for rehearing. This issue was never previously raised in the trial court, nor subsequently raised in Rust's two state post conviction proceedings.

Under rules governing Nebraska appellate practice, new issues may not be injected into an appeal in a motion for rehearing. Rust's motion for rehearing was summarily denied.

In spite of this history, the United States Court of Appeals for the Eighth Circuit (hereinafter "Court of Appeals") concluded that Rust had "fairly presented" this issue to the Nebraska courts and thus preserved that issue for future consideration by the federal courts. The Court of Appeals reached this conclusion over the petitioner's (hereinafter "Warden") protest that Rust had waived his opportunity to have that particular issue considered by the federal courts due to his unexcused failure to assign it as error in his direct appeal.

Question 2

One of the other death penalty cases decided by the Nebraska Supreme Court on February 2, 1977, was one involving defendant Richard Holtan. Holtan also failed to assign as error before the Nebraska Supreme Court the

standard of proof at sentencing issue. However, in the federal courts counsel for then Nebraska Attorney General Robert Spire unilaterally **conceded** on appeal that the failure of Holtan's sentencing panel to articulate the standard of proof employed in finding the existence of statutory aggravating circumstances required Holtan's case be remanded to a state trial court for resentencing.

By the time Rust's case reached federal habeas corpus review counsel of record for the Warden did raise the issue of Rust's state procedural default as a bar to consideration of the standard of proof issue in federal court. Yet both the federal district and appellate courts claimed they were "bound" by the state's prior concession in Holtan's case and refused to further address the Warden's state court procedural default claim in Rust's proceeding.

The Court of Appeals recognized the significance and merit of the Warden's claim by noting that, if it were considered, it could well dictate a different result than that achieved in Holtan's case, but concluded that to allow the Warden to raise that admittedly legitimate defense in Rust's case would represent "arbitrary and capricious procedures." (App. 14). So the defense was ignored.

Question 3

In the course of resolving Rust's direct appeal and exercising its statutory responsibility to conduct de novo review of death sentences the Nebraska Supreme Court acknowledged its conclusion reached that same day in the case of Erwin Charles Simants (another of the first four cases) that Nebraska's statutes required the existence

of statutory aggravating circumstances be established beyond a reasonable doubt, applied that standard to the trial record in Rust's case, and concluded: "We are satisfied from our review of the evidence in this case that the factors upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt." ***State v. Rust***, 197 Neb. at 543, 250 N.W.2d at 876.

The Court of Appeals concluded that because of the nature of Nebraska's statutory sentencing scheme Rust was entitled by the Due Process Clause of the federal constitution to a "two-tier" sentencing process and "meaningful" appellate review, both of which the Court of Appeals concluded were denied Rust by the Nebraska Supreme Court's de novo review of his sentencing record and its conclusion that the statutory aggravating circumstances found by the trial level judicial sentencing panel to be present in his case were, in fact, present on that record beyond a reasonable doubt.

We believe the actions of the Nebraska Supreme Court in reviewing the record in Rust's case and determining that the record supported, beyond a reasonable doubt, a finding that certain statutory aggravating factors were present in this homicide was a legitimate exercise of the Nebraska Supreme Court's state-granted appellate authority and did not violate Rust's right to due process of law.

REASONS FOR GRANTING THE WRIT

QUESTION 1

THE FEDERAL COURTS SHOULD NOT BE FREE TO IGNORE WELL ESTABLISHED STATE COURT PROCEDURES IN DETERMINING WHETHER AN ISSUE IS "FAIRLY PRESENTED" TO THE STATE COURTS

This Court has labored long to bring some sanity and finality to the litigation of death penalty cases in this country. The manner in which the Court of Appeals has dealt with the issue of state court procedural default in this instance is absolutely contrary to the applicable law and so departs in philosophy and practice from efforts to bring finality to the criminal laws as to call for an exercise of this Court's power of supervision.

A.

Applicable federal law

Issues must be appropriately presented to the state courts for review before they may be considered by the federal courts in the context of a petition for habeas corpus relief. ***Teague v. Lane***, 489 U.S. 288, 298 (1989).

> The rule announced in ***Harris v. Reed*** [489 U.S. 255 (1989)] assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one, where the claim was never presented to the state courts.

The federal constitution does not limit the ability of state courts to establish procedures which tell litigants not

only how, but **when**, certain actions must be taken. ***Herrera v. Colins***, 506 U.S. ___, 113 S.Ct. ___, 122 L.Ed.2d 203 (1993).

It is uncontested Rust did not assign the burden of proof issue as an error in the direct appeal of his conviction and sentence to the Nebraska Supreme Court. (App. 55).

B.

State court procedures limit when and how an issue may be properly presented to the Nebraska courts.

Procedures established by the Nebraska Supreme Court for the consideration of any issue on appeal require that any alleged error in the trial proceedings be specifically assigned as error in the initial brief of the appellant.

> Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, **bearing in mind that consideration of the cause will be limited to errors assigned** and discussed. (emp.added).

Revised Rules of the Supreme Court of the State of Nebraska (1974), Rule 8a (3). Long before Rust's appeal was considered this rule has been regularly recognized by the Nebraska Supreme Court in resolving issues on appeal.

> The function of assignments of error is that they set out the issues presented on appeal. They

> serve to advise the appellee of the question submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.

Cook v. Lowe, 180 Neb. 39, 40, 141 N.W.2d 430, 431 (1966). ***See also, McClellen v. Dobberstein***, 189 Neb. 669, 204 N.W.2d 559 (1973).

It is also clear under Nebraska law that errors must be raised in the trial court before they may be considered on appeal.

> Defendant did not raise the constitutional issue in the trial court. It is raised for the first time on appeal. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.

State v. Irwin, 208 Neb. 123, 127, 302 N.W.2d 386, 389 (1981). This issue was not raised at any level in the Nebraska courts prior to Rust's motion for rehearing, if its vague language can be said to have done so.

Finally, the only time Rust even arguably raised this issue in the Nebraska courts was in his motion for rehearing before the Nebraska Supreme Court. The role of a motion for rehearing before the Nebraska Supreme Court is limited. The issues which may properly be urged by a motion for rehearing are restricted to "claimed mistakes or inaccuracies in statements of fact or law in the opinion, and any questions involved which the court is claimed to have failed to consider." ***Revised Rules of the Supreme Court of the State of Nebraska (1974)***, Rule 8d.3. Under

Nebraska practice, a motion for rehearing does not inject new issues into an appellate proceeding. We do not understand that the Court of Appeals is free to ignore that fact in its analysis of whether this issue was "fairly presented" to the Nebraska courts.

C.

Erroneous excuse

The Court of Appeals apparently attempts to sidestep or excuse Rust's uncontested default on this issue by finding: "Rust's first opportunity to raise the issue was in his motion for rehearing after the Nebraska Supreme Court's decision on direct appeal." (App. 11). That is simply not correct.

The very issue which Rust did not assign as error, was assigned as error by another death sentenced litigant whose case was decided at exactly the same time as Rust's. ***See State v. Simants***, 197 Neb. 549, 559, 250 N.W.2d 881, 888 (1977).

Rust can hardly argue, and the Court of Appeals cannot accurately find, that Rust had no prior opportunity to raise this issue, when it is obvious that the issue existed and **was raised** by another litigant in exactly the same time frame that Rust was framing his assignments of error. Rust was not **prevented** from raising this issue before the Nebraska Supreme Court in a correct and timely manner, as the Court of Appeals implies. Rust simply did not do so.

The fact that Rust may not have thought of the argument until after the Simants opinion was published is

wholly irrelevant to any question properly before the federal courts. Rust never offered the error to the Nebraska Supreme Court for review, although other litigants clearly conceived of this issue and did properly present it for the Nebraska Supreme Court's consideration and decision. Rust offers no excuse for this failure.

Finally, Rust never attempted to raise this constitutional issue in subsequent state post conviction actions. ***State v. Rust***, 208 Neb. 320, 303 N.W.2d 490 (1981), ***cert.den.*** 454 U.S. 882; ***State v. Rust***, 223 Neb. 150, 388 N.W.2d 483 (1986), ***cert.den.*** 481 U.S. 1042. Thus, the federal constitutional issue that Rust now seeks to raise in this action was never "fairly presented" to any Nebraska court in accordance with the rules of procedure of those courts, and is thus barred from further consideration by the federal courts. ***Teague v. Lane***, 489 U.S. 288 (1988).

D.

There was no occasion for the Nebraska court to make a "plain statement" of their reasons for denying his motion for rehearing as Rust never fairly presented his burden of proof issue to the Nebraska courts for decision.

The Court of Appeals next concluded that they could reach the merits of Rust's claim because "[t]he Nebraska Supreme Court denied the motion for rehearing summarily and without comment, with no 'plain statement' that the denial was based on an independent state procedural bar." (App. 13). We have already noted that the "plain statement" concept from ***Harris v. Reed*** is irrelevant if the question was never fairly presented to the

Nebraska courts for decision. ***Teague v. Lane***, 489 U.S. at 298. Rust never presented this issue to the Nebraska courts in compliance with Nebraska law and procedure. If the issue is not properly presented for decision, Rust is entitled to no statement as to why it was rejected.

QUESTION 2

THE FEDERAL COURTS ARE NOT FREE TO IMPOSE CONCESSIONS MADE IN A DIFFERENT CASE BY DIFFERENT COUNSEL AND THEREBY IGNORE AN OTHERWISE LEGITIMATE DEFENSE OF THE RESPONDENT BELOW IN THIS, AN ENTIRELY SEPARATE, ACTION

Again, this Court has labored long to bring some sanity and finality to the litigation of death penalty cases in this country. The manner in which the Court of Appeals has found this respondent bound by concessions made by other attorneys in another proceeding before that court is absolutely contrary to the applicable law and so departs in philosophy and practice from efforts to bring finality to the criminal laws as to call for an exercise of this Court's power of supervision.

A.

History

As we noted earlier, the first four opinions handed down by the Nebraska Supreme Court under Nebraska's newly enacted sentencing scheme for first degree murder all were released on February 2, 1977. In addition to Rust's direct appeal, the Nebraska Supreme Court also released its opinion in ***State v. Holtan***, 197 Neb. 544, 250

N.W.2d 876 (1977). Holtan also failed to assign as error before the Nebraska Supreme Court the standard of proof at sentencing issue.

However, on the federal habeas corpus appeal counsel for the respondent in Holtan's case unilaterally and without explanation **conceded** that the failure of Holtan's sentencing panel to articulate the standard of proof employed in finding the existence of statutory aggravating circumstances beyond a reasonable doubt required Holtan's case be remanded to a state trial court for resentencing. ***Holtan v. Black***, 838 F.2d 984, 986 (8th Cir. 1988). In the context of that concession the Court of Appeals declined to address any of the other issues raised in ***Holtan v. Black*** and the cause was remanded accordingly. ***Id.*** In essence and in fact, no "decision" was rendered by the Court of Appeals in that matter due to the unilateral concession of counsel for the respondent at trial.

B.

This proceeding

In Rust's habeas corpus proceeding we are confronted with a radically different set of facts than were present in Holtan's case.

Rust is a different habeas petitioner, sentenced by a different judicial panel for a different crime. The Attorney General of the State of Nebraska is now different, the Assistant Attorneys General who have represented the Warden in this action are different, and finally, and of greatest significance, **no similar concession** has been made by the Warden in this case.

From the outset counsel for the Warden have argued that this issue was defaulted in the state courts and further that the actions of the Nebraska Supreme Court in finding the existence of certain aggravating circumstances beyond a reasonable doubt was appropriate under both Nebraska law and the federal constitution. Yet the Court of Appeals concluded that the concession-driven, un-decision in ***Holtan v. Black*** "is binding on this panel." (App. 14.)

> For us to consider ***Holtan*** any other way, would raise issues with respect to arbitrary and capricious procedures which would require, on the one hand, that Holtan be resentenced and on the other that Rust be executed without resentencing under the correct standard.

Id. What the Court of Appeals refuses to recognize is that the use of such death penalty catch phrases as "arbitrary and capricious" have no application whatsoever when the question is whether there exists a state court procedural default.

In life and litigation some issues are defaulted by some litigants and not by others. The varying results that flow from that reality are not of a federal constitutional dimension. That is simply how life is.

In this instance, in all candor, it appears the respondent in ***Holtan v. Black*** did not receive the same zealous defense and argument of the state's legitimate concerns as did the Warden in this instance. Although the impact of that fact may inure to Holtan's benefit, it has nothing to do with whether the defense raised by the Warden in **this** proceeding should not be governed by the law as

announced by this Court, as opposed to the inexplicable actions of another attorney in another case.

The Warden has demanded the law announced by this Court be applied by the Court of Appeals to his claim that Rust defaulted this issue. The Court of Appeals has denied him that opportunity in order to be consistent in result with a case in which the litigation on behalf of the state was at best half-hearted. The Court of Appeals should be seeking to apply the **law** in each case before it, not feeling "bound" to ignore valid defenses in habeas corpus proceedings in a effort to satisfy some subjective sense of justice.

QUESTION 3

IT DOES NOT VIOLATE DUE PROCESS WHEN, CONSISTENT WITH STATE STATUTES, THE HIGHEST APPELLATE COURT OF A STATE REVIEWS DE NOVO THE RECORD OF THE SENTENCING PROCEEDING AND DETERMINES A SENTENCE OF DEATH IS APPROPRIATE ON THE RECORD DEVELOPED BEFORE THE TRIAL LEVEL JUDICIAL SENTENCING PANEL

A.

The Nebraska system

The procedure for determining an appropriate sentence for an individual guilty of first degree murder in Nebraska is set forth in Neb. Rev. Stat. § 29-2519 *et seq.* (1989).

The determination of an appropriate sentence is not a question left to jurors in Nebraska. Either the trial judge or a panel consisting of the trial judge and two other trial

court judges chosen by the Chief Justice of the Nebraska Supreme Court make the determination as to the sentence to be imposed. Neb. Rev. Stat. § 29-2520 (1989). Nebraska is a "weighing" state in which evidence of statutory aggravating circumstances and mitigation is offered and then aggravating circumstance(s) are "weighed" against any mitigation to determine an appropriate sentence. Neb. Rev. Stat. § 29-2522 (1989). The trial court or sentencing panel is required:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

Id. It is not disputed that the sentencing panel in Rust's case created the record required by Nebraska statutes in imposing a sentence of death upon Rust.

Nebraska statutes require mandatory appellate review of any sentence of death by the Nebraska Supreme Court. Neb. Rev. Stat. § 29-2525 (1989). Nebraska statutes also mandate that the Nebraska Supreme Court conduct a **de novo review** of the sentencing record to determine if the sentence imposed was appropriate. Neb. Rev. Stat. § 29-2521.03 (1989). This represents an exception to the normal function of Nebraska's appellate courts when reviewing the appropriateness of sentences imposed by state trial courts.

> Except under certain circumstances when the Supreme Court is reviewing a sentence of death, an appellate court does not conduct a de novo

> review of the record to determine whether the sentence is appropriate.

State v. Reynolds, 242 Neb. 874, 877, ___ N.W.2d ___ (1993); *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992).

B.

Rust's direct appeal

The judicial sentencing panel in Rust's case presided over the creation of the penalty phase record and made written findings of fact as required by statute. The sentencing panel did not articulate by what standard of proof those findings were made. (App. 44-53).

As previously noted, on the same day that the opinion in Rust's direct appeal opinion was filed, the Nebraska Supreme Court also filed its opinion in the direct appeal of Erwin Charles Simants. As opposed to Rust, Simants **had** raised in his direct appeal the issue of the standard of proof by which penalty phase findings must be made. In Simants' case the Nebraska Supreme Court concluded:

> We believe it is the intent of the act to require the facts upon which the aggravating circumstances referred to in section 29-2523, R.R.S. 1943, are based be proved beyond a reasonable doubt, and so construe it.

State v. Simants, 197 Neb. at 560, 250 N.W.2d at 888.

Thus the stage was set for the Nebraska Supreme Court's review of Rust's sentence. Under Nebraska statutes the Nebraska Supreme Court had at a minimum **two**

statutory obligations to satisfy in conducting their appellate function: (1) to conduct a de novo review of the sentence imposed, and (2) to see that the aggravating circumstances weighed in favor of a sentence of death existed on the record of the sentencing proceeding beyond a reasonable doubt. Although Rust did not raise the issue, the Nebraska Supreme Court, after considering the issues Rust did assign as error, went on to find:

> We have today held in Simants, in response to a constitutional challenge, that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. We are satisfied from our review of the evidence in this case that the facts upon which the findings of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find.

State v. Rust, 197 Neb. at 543, 250 N.W.2d at 876.

C.

The Court of Appeals analysis

Despite the fact that Rust's trial level judicial sentencing panel was guided by appropriate statutory factors, and despite the fact that a record of the basis for the sentencing panel's decision was made, and despite the fact that the sentencing panel rendered a written opinion detailing its findings and conclusions, and despite the fact that the Nebraska Supreme Court mandatorily and **independently** reviewed the findings of that sentencing panel, all in accordance with Nebraska statutes, the Court of Appeals concluded: "In effect, the Nebraska Supreme Court acted as an unreviewable sentencing panel when it

made its findings that the aggravating factors had been proven beyond a reasonable doubt." (App. 15).

D.

The trouble with the Court of Appeals analysis

1.

The Court of Appeals seems to believe that there is something constitutionally magic about having the facts underlying the determination of an appropriate sentence found to exist beyond a reasonable doubt **twice**. We do not find that in our reading of ***Godfrey v. Georgia***, 446 U.S. 420 (1980), and ***Proffit v. Florida***, 428 U.S. 242 (1976) upon which the Court of Appeals relies.

Section 29-2523, as interpreted in ***State v. Simants***, does not dictate **who** must find the aggravating factors to be present beyond a reasonable doubt, but only that they **must** be found to exist beyond a reasonable doubt. Thus the Court of Appeals' theory that the Due Process Clause is implicated here based upon state-created entitlements (App. 16-17) is in error as the entitlement itself, the existence of which is purely a question of state law, simply does not exist here as it did in ***Hicks v. Oklahoma***, 447 U.S. 343 (1980).

2.

Certainly, § 29-2523 does not require that aggravating circumstances **twice** be specifically found to be present beyond a reasonable doubt, only that the record created by the sentencing panel ultimately be found to support that conclusion. It is the existence of **facts** satisfying the

statutory definition of aggravating circumstances which appropriately channels the ultimate sentencing entity's discretion and which saves a death sentencing scheme from constitutional infirmity, not who finds those facts in the first instance.

Under Nebraska statutes, where appeal to the Nebraska Supreme Court is mandatory and where de novo review of the trial level sentencing entity's decision to impose death as a punishment is required, the Nebraska Supreme Court is effectively the ultimate sentencing entity. This would appear indistinguishable from the system described with approval by Justice White in ***Godfrey***, 446 U.S. at 445-446 (White, J., dissenting, joined by Rehnquist, J.)

3.

The Court of Appeals also concluded that the Nebraska Supreme Court's de novo review of the penalty phase record to assure itself that the aggravating factors relied upon in reaching Rust's death sentence, in fact, were established beyond a reasonable doubt denied Rust "meaningful appellate review." (App. 18-22).

How can Rust be denied "meaningful appellate review" by an appellate court which **must** review **de novo** the findings of the trial level sentencing panel? Under the Nebraska statutory scheme the Nebraska Supreme Court must reach an **independent** conclusion regarding the appropriateness of a sentence of death imposed below based upon the **record complied** by the sentencing panel, but **only** in those cases in which a sentence of death has been imposed at the trial level. This

is the most wide open and, from a defendant's standpoint, most meaningful type of appellate review imaginable.

Rust was not denied meaningful appellate review. In accordance with Nebraska law he received the benefit of the broadest, most liberal level of appellate review practiced by American courts. In Nebraska the actions of the trial court in imposing a death sentence is not entitled to the same level of deference which is often – and constitutionally – afforded trial level decisions in other appellate contexts. Under Nebraska law a prisoner sentenced to death is afforded an entirely new "bite at the apple" insofar as the findings and conclusions of the sentencing court are concerned. To claim, as the Court of Appeals has here, that such a liberal level of appellate review **denies** appellate review is simply incorrect.

Whether the findings of the sentencing panel may have been impacted by confusion over the applicable burden of proof is of absolutely no relevance here as de novo review is not based upon the trial court's findings, but upon the appellate court's independent review of the trial record itself. We further note that in Nebraska the second "tier" of review in death penalty cases is not the **first** level of judicial decisionmaking involved in determining an appropriate sentence, contrary to jurisdictions where sentencing decisions at the trial level are left to juries.

4.

We also believe support for the actions of the Nebraska Supreme Court's handling of Rust's direct

appeal can be found in this Court's ruling in ***Clemons v. Mississippi***, 494 U.S. 738 (1990).

This Court noted in ***Clemons*** that a state appellate court may assert "its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed . . . " (***Id.*** at 737) upon the record presented for appellate review.

> The court did not consider itself bound in such circumstances to vacate the death sentence and remand for a new sentencing proceeding before a jury.

Id.

The action of the Nebraska Supreme Court in reviewing Rust's sentence is well within the bounds described as appropriate in ***Clemons***. That is relevant here because the issues before the Nebraska Supreme Court in ***Simants*** represented issues of first impression under Nebraska's new first degree murder sentencing scheme. Thus, at its first opportunity to describe the sentencing process in death penalty cases the Nebraska Supreme Court felt compelled by state statute to take upon **itself** the responsibility to review de novo the record of the penalty phase proceedings and reach an **independent** conclusion whether the record supported the imposition of a particular penalty.

> We are satisfied **from our review of the evidence** in this case that the facts upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find.

Rust, 197 Neb. at 543, 250 N.W.2d at 876 (Emphasis added).

This action by the state appellate court in making independent findings under its state law authority, as opposed to engaging in a harmless error analysis, seems indistinguishable for the process approved in ***Clemons***.

> The [state appellate] court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding before a jury. We have no basis for disputing this interpretation of state law, which was considered by the court below to be distinct from its asserted authority to affirm the sentence on the ground of harmless error and which plainly means that we must reject Clemon's assertion that he had an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed.

Id. at 737. This Court went on to state that there was nothing in a state appellate court undertaking an independent review of the record on appeal "that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence." *Id.* at 739.

5.

Although, the Nebraska Supreme Court did not resolve Rust's direct appeal by means of a harmless error analysis, the following decisions of this Court are instructive in highlighting the difference between error that infects the reliability of proceedings at the trial level and errors which, although requiring correction or amplification on appeal, do not require an entirely new trial level

proceeding. We believe Rust's situation falls clearly within the latter classification of cases.

> Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible. We have previously noted that appellate courts may face certain difficulties in determining sentencing questions in the first instance. See ***Caldwell v. Mississippi***, 472 U.S. 320, 330-331, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). Nevertheless, **that decision is for state appellate courts,** including the Mississippi Supreme Court in this case, to make.

Clemons, at 742 (Emphasis added).

The availability of such a method of appellate analysis hinges upon the state of the **record** created at trial, not the actions of the trial level fact finder.

> Where a **reviewing** court can find that the **record** developed at trial established [an issue] beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Rose v. Clark, 478 U.S. 570, 579 (1986) (Emphasis added). That is **exactly** what the Nebraska Supreme Court did in Rust's case. In ***Rose*** this Court further stated:

> Unlike errors such as judicial bias or denial of counsel, the error in this case [jury instruction which shifted the burden of proof to defendant] did not affect the composition of the **record**.

Id. at 579, fn 7.

If problems as fundamental as the misplacement of the burden of proof can appropriately be remedied at the appellate level, as in ***Rose***, then certainly de novo review of such an untainted record, when authorized by state statutes, could be appropriately applied to a record created where the burden never shifted to the defendant but only the standard of proof necessary may have been in question. To argue that Rust's counsel would have somehow held back evidence in mitigation or restrained his attack upon evidence of aggravation due to any confusion as to the appropriate burden of proof is incredible. If anything, confusion about the appropriate burden of proof, if it existed, would have **heightened** counsel's efforts to create an adequate record to save his client's life, not induced counsel into a **less** adversarial approach to creation of the penalty phase record.

CONCLUSION

This case has taken eighteen years to reach this juncture. The last six of which have been consumed by the federal district and circuit courts. Now the Court of Appeals concludes this case must return to square one for resentencing. Finality escapes us.

To accomplish this result the Court of Appeals has had to: (1) ignore clearly established state court procedures for bringing issues before the Nebraska Supreme Court for review; (2) ignore Rust's clear and unexcused state court default of the pivotal issue in this case; (3) ignore the clearly declared state statutory obligation of the Nebraska Supreme Court to review de novo every sentence of death imposed in that state; and (4) declare itself "bound" to reach its conclusion in this case because of a concession made by another respondent, represented by other counsel in another case.

For each and all of these reasons the decision reached by the Court of Appeals in this case calls for the exercise of this Court's power of supervision to rectify the errors below.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 91-2453

John E. Rust,
Plaintiff – Appellant,

v.

Frances X. Hopkins,* Warden
Nebraska State Penitentiary,
Defendant – Appellee.

No. 92-2680

John E. Rust,
Plaintiff – Appellee,

v.

Frances X. Hopkins, Warden,
Nebraska State Penitentiary,
Defendant – Appellant.

No. 92-3195

John E. Rust,
Plaintiff – Appellant,

v.

Frances X. Hopkins, Warden,
Nebraska State Penitentiary,
Defendant – Appellee.

Appeals from the United States District Court for the District of Nebraska.

*Frances X. Hopkins replaced Harold W. Clarke as the defendant-appellee in this action.

Submitted: October 13, 1992

Filed: January 20, 1993

Before JOHN R. GIBSON, Circuit Judge, LAY, Senior Circuit Judge, and LOKEN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Frances X. Hopkins, Warden of the Nebraska State Penitentiary, appeals from a district court[1] order granting a writ of habeas corpus and ordering resentencing of John E. Rust, who had been convicted of murder and sentenced to death. The district court granted the writ on two bases: First, the Nebraska Supreme Court denied Rust due process of law by finding on appeal that the aggravating factors were proven beyond a reasonable doubt, even though the sentencing panel had applied a lower standard of proof; second, Rust's trial counsel rendered ineffective assistance by failing to consult with Rust before sentencing and by failing to clarify the facts surrounding the killing when arguing before the sentencing panel. Hopkins argues that the first issue was not fairly presented to Nebraska courts, and thus, is procedurally barred. Hopkins also argues that even if the issue is not procedurally barred, Rust was not denied due process, because the Nebraska Supreme Court found adequate evidence to support the sentence of death beyond a

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[1] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

reasonable doubt. As to the second issue, the warden argues that the district court erred in finding ineffective assistance of counsel and prejudice. Rust cross appeals, arguing that the district court erred in failing to grant the writ on several other grounds. We affirm the issuance of the writ.

Rust was charged with shooting and killing civilian Michael Kellogg, who had chased and shot at Rust after Rust had participated in an armed robbery. Rust returned fire and shot Kellogg three times. A police officer observed part, but not all, of the incident. At trial, the officer testified that he did not see the first shot, but did see Kellogg shot again "when he first started to fall," and "as he went down." The officer responded to the leading question, "As he was down?" by saying "Yes, sir."

Rust was convicted of Kellogg's murder, and a sentencing panel of three state district judges was convened to determine whether the death penalty was warranted. *See* Neb. Rev. Stat. § 29-2520 (1975). At the sentencing hearing, the prosecutor argued that the death penalty should be imposed and described the officer's trial testimony: "[Officer Wolf] saw Mr. Kellogg falling to the ground, at which time John Rust fired two more shots into his body and Michael Kellogg fell over dead." Rust's trial counsel strenuously argued the presence of mitigating factors, and described the killing:

> We don't have John Rust going into somebody's house and cold-bloodedly killing them; and cold-bloodedly raping them.
>
> Mr. Kellogg introduced himself into the situation.

> . . . at no request from anyone. . . .
>
> He came around the corner with his gun blazing . . .
>
> So, we got Mr. Rust standing in the back yard with somebody shooting at him.

Rust's counsel, however, then said, "I don't think that all is relevant today."

The sentencing panel considered the statutory aggravating factors[2] and found that four existed: (a) Rust had been convicted of earlier crimes involving the use or

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[2] *See* Neb. Rev. Stat. § 29-2523(1) (1975), identifying the following aggravating circumstances for consideration:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
> (e) At the time the murder was committed, the offender also committed another murder;
> (f) The offender knowingly created a great risk of death to at least several persons;
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

threat of violence; (b) Rust murdered Kellogg to conceal the commission of crimes and his identity; (f) Rust knowingly created a great risk of death to at least several persons, and this factor existed to a great degree; and (h) Rust murdered Kellogg to disrupt and hinder the lawful exercise of a governmental function or the enforcement of the laws. Although the sentencing panel concluded that aggravating circumstance (d) did not exist, it observed that "[i]nstead of continuing with his escape, [Rust] . . . deliberately fired two more shots at Kellogg while he was wounded and lying on the ground." The panel then considered all the mitigating circumstances,[3] and concluded that Rust committed the crime while he was under the influence of extreme mental or emotional

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[3] Neb. Rev. Stat. § 29-2523(2) (1975) provides for mitigating circumstances:

> (a) The offender has no significant history of prior criminal activity;
>
> (b) The offender acted under unusual pressures or influences or under the domination of another person;
>
> (c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;
>
> (d) The age of the defendant at the time of the crime;
>
> (e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;
>
> (f) The victim was a participant in the defendant's conduct or consented to the act; or
>
> (g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

disturbance. The panel weighed the aggravating and mitigating circumstances and concluded that a sentence of death was warranted. Rejecting Rust's constitutional objections, the panel entered a judgment of guilt and a sentence of death.

On direct appeal, the Nebraska Supreme Court affirmed Rust's conviction and death sentence. *State v. Rust*, 250 N.W.2d 867 (Neb.), *cert. denied*, 434 U.S. 912 (1977). The Nebraska Supreme Court set out the facts of the case and stated that Rust "was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust." *Id.* at 871. The court then discussed each of the factors in detail. *Id.* at 872-76. On the same day it decided *Rust*, the court also decided *State v. Simants*, 250 N.W.2d 881 (Neb.), *cert. denied*, 434 U.S. 878 (1977), which held for the first time that aggravating circumstances must be proven beyond a reasonable doubt. *Rust*, 250 N.W.2d at 876. The court affirmed Rust's death sentence, concluding that its review of the evidence indicated that each circumstance in Rust's case had been proven beyond a reasonable doubt as *Simants* required. *Id.*

Rust moved for rehearing, arguing that the sentencing panel probably applied the standard from *Grandsinger v. State*, 73 N.W.2d 632 (Neb. 1955), *cert. denied*, 352 U.S. 880 (1956), which did not require proof of aggravating circumstances beyond a reasonable doubt. Rust argued that the interest of justice and due process required that his sentence be vacated and the case be remanded for resentencing in light of the new *Simants* standard. The Nebraska Supreme Court summarily denied the motion for rehearing without opinion.

Rust then challenged his conviction and sentence under the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 to -3004 (1985). One of his claims alleged ineffective assistance of counsel, but all claims were denied, and the Nebraska Supreme Court affirmed the denial. *State v. Rust*, 303 N.W.2d 490 (Neb.), *cert. denied*, 454 U.S. 882 (1981). Rust then brought an action in the federal district court, but because certain claims had not been exhausted at the state level, he was required to again seek post-conviction relief. *See State v. Rust*, 388 N.W.2d 483, 488 (Neb. 1986), *cert. denied*, 481 U.S. 1042 (1987). His post-conviction relief request was again denied, and the Nebraska Supreme Court affirmed. *Id.*

Rust unsuccessfully sought state habeas corpus relief in *Rust v. Gunter*, 421 N.W.2d 458 (Neb. 1988), and then filed this habeas corpus action with the district court under 28 U.S.C. § 2254 (1988). The case was referred to a magistrate judge[4] for a report and recommendation. The magistrate judge found that the sentencing panel applied the wrong standard, the Nebraska Supreme Court could not cure this error, and the factfinding process did not support a harmless error analysis. The magistrate judge recommended abstention as to the remainder of the errors Rust alleged.

The district court adopted the magistrate judge's findings and recommendations and ordered that Rust's sentence be reduced to life imprisonment unless the State initiated capital resentencing proceedings within sixty

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[4] The Honorable Richard G. Kopf, United States Magistrate Judge for the District of Nebraska.

days from the date the judgment was entered. The district judge abstained from considering the remaining issues. The warden appealed from this order, and the case was briefed and argued before this panel. We remanded for consideration of the remaining issues, and because of the length of time the case had been pending, we requested that the district court decide those issues within ninety days.[5] *Rust v. Clarke*, 960 F.2d 72, 73-74 (8th Cir. 1992).

The district court then entered an additional order, granting habeas relief on Rust's ineffective assistance of counsel claims relating to the sentencing phase of his

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[5] We are concerned by the length of time this case has been pending before the courts – over seventeen years. The robbery and shooting occurred on February 21, 1975. Rust's trial concluded on August 1, 1975, he was sentenced on October 30, 1975, and his conviction was affirmed on direct appeal on February 2, 1977. Rust's post-conviction remedies were denied March 20, 1981. His first federal habeas was dismissed for lack of exhaustion, and Rust again returned to the state courts where his second post-conviction proceeding was denied, and the Nebraska Supreme Court affirmed on June 13, 1986. Rust's petition for writ of habeas corpus in the state courts was denied, and the Nebraska Supreme Court affirmed on April 1, 1988. Thus, twelve years and eight months elapsed between trial and the state court's final denial of relief.

Rust filed this action in the district court on June 9, 1987, an amended petition was filed by stipulation on July 6, 1988, and the court's first order was entered May 13, 1991. We heard argument on March 9, 1992, but because the district court had not disposed of all the issues, we remanded for consideration of the remaining issues, requiring that an order be entered within ninety days. The district court entered its second order on June 18, 1992, and the case was submitted to this panel on October 13, 1992.

trial. The district court thoroughly examined Rust's ineffective assistance of counsel claims and concluded that counsel had failed to adequately discuss with Rust the strategy and evidentiary and procedural aspects of the sentencing hearings, and failed to argue the facts surrounding the killing to the sentencing panel. The district court found that this failure gave the panel and the Nebraska Supreme Court the erroneous impression that Rust stood over Kellogg and shot him twice while he lay helpless on the ground. Accordingly, the district court entered judgment in favor of Rust, ordering that his sentence be reduced to life imprisonment unless the State initiated capital resentencing proceedings within sixty days after the judgment became final. The district court also considered and rejected other claims for relief, including ineffective assistance of counsel claims regarding Rust's conviction. We discuss these claims in part IV of this opinion.

I.

Before considering Rust's standard of proof claim, we must determine whether the district court erred in holding that this issue was fairly presented to the state courts. The warden argues that the claim was not fairly presented and therefore we must determine whether there was cause for failure to raise the issue, and prejudice from the state court's failure to address the merits of the claim.

In *Laws v. Armontrout*, 834 F.2d 1401 (8th Cir. 1987), *aff'd on reh'g*, 863 F.2d 1377 (8th Cir. 1988) (en banc), *cert.*

denied, 490 U.S. 1040 (1989), we explained that to fairly present an issue:

> [A] petitioner need give only the substance of his claim to the state courts. But to do so, the petitioner must include the same facts and legal theories to the state court that he seeks to present to the federal court so that the state court can apply the controlling legal principles to the facts bearing upon his federal constitutional claim. . . . To reiterate, "the petitioner must have informed the state court of both the *factual and legal* premises of the claim he asserts in federal court." . . .

Id. at 1412 (citations omitted).

The warden argues that Rust failed to present the standard of proof issue in the Nebraska courts: specifically, that Rust did not raise the reasonable doubt issue before the trial court, include it in his assignments of error, or brief it on direct appeal. However, Rust's first opportunity to raise the issue was in his motion for rehearing after the Nebraska Supreme Court's decision on direct appeal.

The critical question is whether Rust fairly presented the issue in that motion. The motion for rehearing, which the Nebraska Supreme Court summarily denied, argued that "the interest of justice and due process require that the sentence . . . be vacated and remanded for resentence in conformity with the opinion of this court that the aggravating circumstances must be found beyond a reasonable doubt." The motion then specifically referred to the action of the Nebraska Supreme Court in *Simants*, overruling *Grandsinger*, 73 N.W.2d at 632, and holding

that "the facts upon which the aggravating circumstances are based [must] be proved beyond a reasonable doubt." Magistrate's Finding of Feb. 14, 1990, at 37. The supporting brief continued:

> It is very probable that the trial court found the aggravating circumstances using the rule in *Grandsinger* which this Court has expressly overruled as not applicable to our present law. Since the trial court or panel is the trier of facts as to the aggravating circumstances, this Court has no way of knowing whether the trial court found these circumstances beyond a reasonable doubt and must vacate and remand for a proper sentencing determination.

Id.

This language from the motion for rehearing and brief before the Nebraska Supreme Court squarely presented the facts on which Rust's argument is based. These facts are: (1) the adoption in *Simants* of a beyond a reasonable doubt standard, and (2) the application of this new standard in *Rust*. In addition, the Nebraska Supreme Court knew the only other material circumstance; namely, that *Simants* and *Rust* were decided the same day, and thus the rule announced in *Simants* and incorporated in *Rust* was unknown to Rust until that day. The motion for rehearing was Rust's first opportunity to raise the issue of the new standard of proof.

Under *Laws*, the next inquiry is whether the legal theory relating to this issue was fairly presented. 834 F.2d at 1412. Rust's rehearing motion raised a due process argument and amplified it by pointing out that the sentencing panel probably employed the old standard of

proof from *Grandsinger*, which *Simants* overruled. Rust argued that because the panel was the factfinder, the Nebraska Supreme Court would have no way of knowing whether the panel found these circumstances beyond a reasonable doubt. These statements taken together contained the essence of Rust's due process argument. As the magistrate judge observed, the Nebraska Supreme Court had before it every legal and factual component of the argument:

> [A] claimed due process violation arising out of a lack of direction to the sentencing panel because of the silence of the statute and the existence of *Grandsinger*, the specification of the standard for the first time on appeal, and the application of that standard to the evidence in the case for the first time on appeal.

Magistrate's Findings of Feb. 14, 1990, at 38.

The magistrate judge concluded that while Rust's claim was not identical to that considered in *Simants* and *Rust*, or to that in Rust's motion for reconsideration and brief to the Nebraska Supreme Court, "the issues are sufficiently close both legally and factually so that it may be confidently said that the Nebraska Supreme Court was fairly presented with the issue now presented here."

The warden responds that the brief references in the motion for rehearing and brief did not fairly present the issue because they cited no specific constitutional provision or any federal cases, and because the Nebraska Supreme Court in *Simants* decided the issue not as a federal constitutional issue, but on state law grounds. These arguments are unpersuasive. In *Simants*, the Nebraska Supreme Court considered the Nebraska death

penalty statutes under both the federal and state constitutions. 250 N.W.2d at 885, 888, 894. In its constitutional analyses, *Simants* cites only decisions of the United States Supreme Court. *Id.* The Nebraska Supreme Court in *Rust* refers to *Simants'* holding "in response to a constitutional challenge." *Rust*, 250 N.W.2d at 876.

Similarly, the specific references in Rust's motion for rehearing and supporting brief were more than sufficient to fairly present the standard of proof issue to the Nebraska courts. The motion specifically referred to the following: due process, the overruling of the *Grandsinger* standard, the inability to know whether the sentencing panel found the aggravating circumstances beyond a reasonable doubt, and the three opinions of the Nebraska Supreme Court issued the same day on which the *Simants* rule was applied by the appellate court to *Rust*.

The Nebraska Supreme Court denied the motion for rehearing summarily and without comment, with no "plain statement" that the denial was based on an independent state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 261-62 (1989). Significantly, in referring to *Simants*, the Nebraska Supreme Court itself raised the standard of proof issue in Rust's case. *See Rust*, 250 N.W.2d at 876.

As the standard of proof issue was fairly presented, we need not consider cause and prejudice.

II.

Having cleared this threshold, we now review the district court's determination that the proceedings in the

Nebraska Supreme Court violated due process. There are two general points at issue here.

First, the warden argues that the magistrate judge erred in ruling that our decision in *Holtan v. Black*, 838 F.2d 984 (8th Cir. 1988), is binding precedent. *Holtan* would require that we affirm the district court in granting habeas relief and require resentencing with ascertainment of aggravating circumstances beyond a reasonable doubt. The warden argues that *Holtan* does not control because it was based on the State's concession that Holtan should be resentenced, and that the State made no such concession in this case. In *Holtan* the writ was issued on two grounds: (1) the failure of the sentencing panel to determine that aggravating circumstances had been established beyond a reasonable doubt; and (2) a holding that aggravating circumstance (d) defined in section 29-2521 (the "depravity" circumstance) was unconstitutionally applied. The State appealed only on the depravity issue. We refused to reach this issue as not ripe, stating: "As the State concedes, the sentencing panel's failure to ascertain whether the State had demonstrated aggravating circumstances beyond a reasonable doubt requires this case to be remanded." 838 F.2d at 986. While referring to the concession, *Holton* affirmed the district court's judgment requiring remand for resentencing under the beyond a reasonable doubt standard. We think it evident that this was a decision on the merits that is binding on this panel. For us to consider *Holtan* any other way, would raise issues with respect to arbitrary and capricious procedures which would require, on the one hand, that Holtan be resentenced and on the other that Rust be executed without resentencing under the correct standard.

The second issue is whether the proceedings in the Nebraska Supreme Court were essentially an unreviewable resentencing in violation of Rust's constitutional rights or were merely a permissible appellate "cure" of deficiencies in the sentencing panel proceedings. We affirm the rulings of the district court that this was an unconstitutional, unreviewable resentencing.

The district court adopted the magistrate judge's findings that the Nebraska Supreme Court had found that the existence of each aggravating factor in Rust's case was proven beyond a reasonable doubt. However, because the Nebraska Supreme Court created the beyond a reasonable doubt requirement on the same day that it made this finding, the district court concluded that the sentencing panel "probably" had not applied the beyond a reasonable doubt standard. The district court, relying on *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), determined that Rust was constitutionally entitled to a "two-tier" sentencing process: an initial sentencing by the sentencing panel and a review of that sentence in the Nebraska Supreme Court. The district court concluded that because the beyond a reasonable doubt standard was applied only on appeal by the Nebraska Supreme Court, Rust was deprived of his state statutory right to be sentenced under the proper standard by a sentencing panel, and to have the Nebraska Supreme Court review that sentence. In effect, the Nebraska Supreme Court acted as an unreviewable sentencing panel when it made its findings that the aggravating factors had been proven beyond a reasonable doubt.

The warden argues that the Nebraska Supreme Court simply cured any uncertainty over the standard of proof

applied in Rust's case by means of a reweighing or a harmless error analysis as permitted under *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Clemons* is inapplicable and we affirm the district court.

Nebraska law requires the sentencing judge or judges to consider both aggravating and mitigating circumstances. Neb. Rev. Stat. § 29-2522 (1973). In construing this section, the Nebraska Supreme Court stated:

> We believe the obvious intent of the statute is that the enumerated aggravating circumstances should require strong proof. Aggravating circumstances are now a mandatory element to be considered in capital cases. The sentence depends upon the proof of some aggravating circumstance. We believe it is the intent of the Act to require the facts upon which the aggravating circumstances referred to in section 29-2523, R.R.S. 1943, are based be proved beyond a reasonable doubt, and so construe it.

Simants, 250 N.W.2d at 888. Either the judge who presided at trial or a panel of three judges, usually including the judge who presided at trial, will determine the proper sentence. Neb. Rev. Stat. § 29-2520 (1975). The Nebraska Supreme Court automatically reviews all capital punishment cases. Neb. Rev. Stat. § 29-2525 (1975).

Therefore, Rust had a statutory right to: (1) have his trial judge or a three-judge panel including his trial judge consider aggravating circumstances based on facts proven beyond a reasonable doubt and to sentence him based on those findings; and (2) have the determination of that sentencing panel reviewed in the Nebraska Supreme Court. While created by state law, these are not

"procedural right[s] of exclusively state concern," they are liberty interests protected by the Fourteenth Amendment. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). When Nebraska, without due process, deprived Rust of these rights, it violated rights guaranteed him under the United States Constitution. This violation was two-fold.

First, Rust was not sentenced by a panel applying the beyond a reasonable doubt standard for aggravating circumstances. We presume, as did the district court, that the judges on the sentencing panel applied the then current standard as set out in *Grandsinger*, 73 N.W.2d at 632, because the panel would not have been following applicable law if it did not do so. *See Simants*, 250 N.W.2d at 888. The proper standard was not applied until the Nebraska Supreme Court reviewed Rust's sentence. However, the Supreme Court has recognized that "when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes." *Clemons*, 494 U.S. at 746. Here, Nebraska created a liberty interest in having a panel of judges make particular findings, specifically, the proper weight to be given aggravating circumstances based on facts proven beyond a reasonable doubt. Rust was deprived of this interest, a deprivation so serious that it cannot be cured by appellate review. The sentencing panel's use of an improper standard contaminated all its findings regarding aggravating circumstances. Rust simply never had the opportunity to be sentenced by a panel as contemplated in the Nebraska statutes.

We recognize, of course, that an appellate court is fully competent to "cure" some sentencing deficiencies in

capital cases. However, we think such appellate remedies are appropriate when the initial sentencing was tainted by relatively minor errors (such as the improper consideration of an invalid aggravating circumstance). We do not believe that *Clemons* or any other decision on this issue supports the proposition that an appellate court can provide an adequate "cure" when the entire first tier of the sentencing process was invalid.

The second facet of the constitutional violation here is the deprivation of any meaningful appellate review. Even if we assume that the Nebraska Supreme Court could have remedied the invalidity in the sentencing panel's determination by stepping in and "resentencing" Rust under the proper standard, the actions of the Nebraska Supreme Court would still violate due process. The whole point of the two-tier sentencing procedure is that the initial determination is reviewed by an independent appellate court. The two-tier process would be subverted if the Nebraska Supreme Court could step in and fully perform the work of the sentencing panel. Yet that is precisely what happened in this case. The Nebraska Supreme Court did not merely "review" the determinations of the sentencing panel, it effectively resentenced Rust under a standard it had created that very same day. The existence of independent (and often automatic) appellate review has been a crucial factor in the Supreme Court's upholding the constitutionality of state capital punishment schemes. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt*, 428 U.S. at 253; *Godfrey*, 446 U.S. at 429. Thus, the deprivation of meaningful appellate review is an independent violation of Rust's constitutional rights. The district court correctly interpreted

Proffitt and *Godfrey* on this point, and we affirm its conclusion.

Contrary to the warden's argument, we believe that *Clemons* does not apply here. We base this conclusion on three factors. First, the *Clemons* decision addressed the permissibility of a state procedure authorizing an appellate court to reweigh the remaining aggravating and mitigating circumstances examined by the sentencing entity after that appellate court had found one or two of the aggravaging circumstances invalid. In *Clemons,* the Mississippi Supreme Court asserted its authority under state law to affirm a death sentence in this manner. *See Clemons,* 494 U.S. at 743-44. This assertion distinguished the *Clemons* facts from those of *Hicks:*

> Contrary to the situation in *Hicks,* the state court in this case, as it had in others, asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been, or was improperly, presented to the jury. . . . We have no basis for disputing this interpretation of state law, which was considered by the court below to be distinct from its asserted authority to affirm the sentence on the ground of harmless error, and which plainly means that we must reject Clemons' assertion that he had an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed. In this respect, the case is analogous to *Cabana v. Bullock* . . . where we specifically rejected a due

> process challenge based on *Hicks because state law created no entitlement to have a jury make findings that an appellate court also could make.*

Clemons, 494 U.S. at 747 (emphasis added).

Therefore, the *Clemons* petitioner had no state law created entitlement, and furthermore, state law specifically authorized the procedure employed by the appellate court. In contrast, Rust has such an entitlement; namely, a right to be sentenced under the proper standard by the sentencing panel. Therefore, his situation is not analogous to *Clemons*, but more closely resembles *Hicks*. When such a state-created liberty interest is taken away in sentencing, the violation is far more serious than that alleged in *Clemons* when no state law entitlement was jeopardized, and the appellate "cure" was authorized by state law.

The second factor supporting our decision is related to the first. Our reading of *Clemons* and the cases that follow it convince us that the Court is simply authorizing the reweighing of the remaining valid aggravating circumstances, not the replacement of invalid proceedings with corrected proceedings in the appellate court. *See Clemons*, 494 U.S. at 748-50, 754; *Sochor v. Florida*, 112 S. Ct. 2114 (1992); *Stringer v. Black*, 112 S. Ct. 1130, 1136-37 (1992); *Yates v. Evatt*, 111 S. Ct. 1884 (1991). This is also the interpretation this circuit has given to the *Clemons* decision. *See Moore v. Clarke*, 951 F.2d 895, 897 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1995 (1992). When the sentencing judge or panel has based the death sentence on a number of factors, and one of these factors is later found to be constitutionally invalid, *Clemons* allows the appellate court to either "reweigh" the remaining valid factors

or to perform a harmless error analysis. *Clemons*, 494 U.S. at 750, 752-54. The Court cautioned against the wholesale adoption of even this limited version of appellate remediation:

> Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible. We have previously noted that appellate courts may face certain difficulties in determining sentencing questions in the first instance. . . .

Id. at 754 (citation omitted). *Clemons* does not authorize an appellate court to "cure" a sentence based entirely on invalid considerations. Here, the use of an improper standard of proof infected all of the sentencing panel's findings – there is no valid remnant to salvage, no untainted factors to be reweighed. What the Nebraska Supreme Court did here is far beyond what was authorized in *Clemons;* while *Clemons* envisioned a limited cure, the Nebraska Supreme Court performed major corrective surgery.

The third factor is the recognition of an independent constitutional violation in Rust's loss of an opportunity for appellate review. *Clemons* and its progeny address situations in which the constitutional violations are confined to deficiencies in the sentencing process below.

Here, the action of the appellate court in curing these deficiencies by stepping in the shoes of the sentencing panel, creates an additional violation by eliminating the possibility of appeal. This is a complication not addressed in *Clemons*, and we would ignore it if we adopted the warden's position.

Finally, we conclude that even applying *Clemons*, the Nebraska Supreme Court's action would still be deficient. Under *Clemons*, an appellate court faced with deficiencies in the first tier of a capital sentencing procedure has two options: it may eliminate the invalid factors considered by the sentencing panel below and reweigh the remaining valid factors, or it may perform harmless error analysis. *Clemons*, 494 U.S. at 750, 752-54. As we have pointed out, reweighing did not occur in this case because there were no valid factors emerging from the sentencing panel. Nor do we believe that the Nebraska Supreme Court performed a proper harmless error analysis. It stated:

> We are satisfied from our review of the evidence in this case that the facts upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find. In making such a finding we have applied the same standard of reasonable doubt as applicable to the burden of proof in criminal cases. NJI No. 14.08. See, *State v. Rice*, 188 Neb. 728, 751, 199 N.W.2d 480; *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.E.2d 705, 24 A.L.R.3d 1065.

Rust, 250 N.W.2d at 876.

Like the Supreme Court in *Clemons*, we are troubled by this "cryptic holding." *Clemons*, 494 U.S. at 753-754.

When a state supreme court found the imposition of the wrong standard of proof by a sentencing panel to be harmless error, we would expect to see the same sort of detailed examination of the evidence that the Supreme Court expected to see in *Clemons*. *Id.* Consequently, we cannot conclude that the Nebraska Supreme Court performed a harmless error analysis adequate under the standards of *Chapman v. California*, 386 U.S. 18 (1967). The court's mere citation of *Chapman* in lieu of a plain statement summarizing its analysis does not suffice. *See Sochor*, 112 S. Ct. at 2123. Therefore, even if we applied *Clemons*, we cannot conclude that the Nebraska Supreme Court had met the standards set out in that opinion.

We therefore affirm the judgment of the district court that the proceedings in the Nebraska Supreme Court violated due process and deprived Rust of his constitutional rights created by the Nebraska capital sentencing procedures.

III.

Rust's alternative argument, that he was denied effective assistance of counsel during the sentencing phase of his trial, raises issues that we need not reach at this time. As we have affirmed the granting of the writ on the beyond a reasonable doubt standard issue, further resentencing proceedings will in all likelihood insure that these issues will not recur. Accordingly, we need not analyze these issues in detail.

IV.

In his cross-appeal, Rust asks that we reverse the district court's rulings as to five other claims. First, Rust argues that the district court erred by not granting the writ on over thirty other ineffective assistance of counsel claims. The district court thoroughly examined each claim and found that even assuming ineffective assistance, Rust was not prejudiced. *See Strickland*, 466 U.S. at 694. We have carefully reviewed each claim, and affirm.

Second, Rust argues that the sentencing panel inappropriately considered a juvenile conviction when it had previously sustained an objection, agreeing that it would not be considered. The district court found that the sentencing panel only considered the conviction with regard to an aggravating factor that the panel concluded did not exist, and the panel's consideration of the juvenile conviction did not infect the panel's failure to find that a mitigating circumstance existed because other convictions were admitted and were enough to negate the existence of that mitigating circumstance. We affirm.

Third, Rust argues that Neb. Rev. Stat. § 28-401 (Supp. 1973) is unconstitutional because a defendant may be charged, convicted, and sentenced to death for a killing committed without premeditation, deliberation, or intent to kill. Relying on *Enmund v. Florida*, 458 U.S. 782, 792, 798 (1982), and *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the district court ruled that the statute and its application in this case were constitutional. We agree.

Fourth, Rust argues that his jury did not reflect a fair cross-section of the community. Specifically, he finds error with the trial court's dismissal of a prospective juror

who had reservations about the death penalty, observed the victim's funeral procession, had been exposed to media coverage, and stated that she might be influenced by what she read and saw. The district court found there was no basis under 28 U.S.C. § 2254(d) for overturning the state trial court's decision. *See Wainwright v. Witt*, 469 U.S. 412 (1985). We agree that it was more to Rust's benefit, than detriment, to have the juror removed, and affirm.

Finally, Rust argues that the Nebraska death penalty statutes are vague and overbroad in violation of his Fourteenth Amendment due process and equal protection rights. The district court thoroughly analyzed this claim and held that the statutes are not overbroad or vague, and that the statutes were not applied in an arbitrary and capricious manner. After carefully reviewing the statutes and Rust's arguments, we affirm the district court's findings.

We affirm the issuance of the writ, and the district court's rejection of Rust's various other claims.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST Petitioner, vs. STATE OF NEBRASKA, Respondent.	CV 87-L-340 MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

This case is before me to issue findings and recommendations regarding the amended petition for writ of habeas corpus filed by petitioner John E. Rust seeking relief from his conviction and sentence of death (filings 31, 39 and 40).

I will recommend the entry of judgment providing that Rust's sentence shall be reduced to life imprisonment, unless within sixty (60) days after the judgment becomes final the State of Nebraska initiates capital resentencing proceedings. I will further recommend that this court stay consideration of all other substantive issues raised by the petitioner until Rust's sentence has been reduced to life imprisonment or he has been resentenced. This stay should be without prejudice to further consideration of the remaining issues at the appropriate time, with the court retaining jurisdiction for such purpose.

I find that Rust was denied due process of law because: (a) the sentencing panel which imposed the death sentence had no clear guidance as to the correct standard of proof – proof beyond a reasonable doubt – to

apply in finding aggravating circumstances; (b) the sentencing panel failed to find aggravating circumstances by proof of any standard; (c) the Nebraska Supreme Court first announced the proof beyond-a-reasonable-doubt standard at the time of Rust's direct appeal; and (d) the Nebraska Supreme Court applied that holding to Rust on appeal, without remand for resentencing (filing 31, page 23 (Claim 12A)). I shall refer to the foregoing issue as the **Holtan** issue because the same issue was presented in **Holtan v. Black,** 838 F.2d 984, 986 (8th Cir. 1988) (as a result of the failure of a three-judge sentencing panel to ascertain whether the state had demonstrated aggravating circumstances beyond a reasonable doubt, resentencing was required), and the Eighth Circuit Court of Appeals ordered resentencing as a result.

I. Statement of the Case[1]

A. General procedural History

Rust is an inmate at the Nebraska penitentiary. He was convicted by a jury in the Douglas County District Court of first-degree murder while in the commission of a crime under **Neb. Rev. Stat.** § 28-401 (Supp. 1973) (felony murder) and three charges of shooting with intent to kill, wound or maim under **Neb. Rev. Stat.** § 28-410 (Cum. Supp. 1972). Essentially, Rust was charged with shooting

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[1] To the extent that any of the statements contained in Part I are properly considered to be findings of fact it is my intention that they be considered as such, and I so find. In a similar vein, to the extent that any of the statements contained in Part I are more properly considered conclusions of law it is my intention that they be considered as such, and I so conclude.

and killing a civilian who chased and shot at Rust after Rust had participated in an armed robbery.

Rust was sentenced to death on the felony murder charge and sentenced to sixteen and two-thirds (16 2/3) to fifty (50) years in prison on the remaining charges. Direct appeal was taken, and the decision of the trial court was affirmed. **State v. Rust,** 197 Neb. 528, 250 N.W.2d 867, **cert. denied,** 434 U.S. 912 (1977). Rust's challenges to the conviction and sentences under the Nebraska Post Conviction Act were denied by a state district court, and that court's decision was affirmed in **State v. Rust,** 208 Neb. 320, 303 N.W.2d 490, **cert. denied,** 454 U.S. 882 (1981). Following the denial of state postconviction relief, Rust sought relief in this court (CV 81-L-332), but because of lack of exhaustion as to certain claims, (Exh. 41), Rust again sought postconviction relief in state court, which relief was denied. **State v. Rust,** 223 Neb. 150, 388 N.W.2d 483 (1986), **cert. denied,** 481 U.S. 1042 (1987). The petitioner also unsuccessfully sought state habeas corpus relief in **Rust v. Gunter,** 228 Neb. 141, 421 N.W.2d 458 (1988), essentially challenging conditions of confinement.

B. Procedural History of this Case

This action was commenced by the filing of a petition (filing 5) on June 9, 1987, followed by the filing of an amended petition (filings 31 and 40) on July 6, 1988. The case was originally assigned to Judge Warren K. Urbom, and pursuant to the court's operating procedures the case

was referred to Magistrate David L. Piester for the issuance of findings and recommendations. Magistrate Piester ordered the parties to submit briefs and relevant records. (Filing 12). The parties entered into a stipulation agreeing that the court could receive as evidence the entire record of Rust's trial, the entire record of Rust's first state postconviction action, the entire record of Rust's first federal habeas action, and the entire record of Rust's second state postconviction action. (Filing 13). Attached to the stipulation is an exhibit list which I will refer to, when necessary, to designate portions of the stipulated record in this case. (Filing 13, Attachment (Exhibit List)).[2] Magistrate Piester also ordered the parties to move, if they so desired, to expand the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts no later than March 10, 1988 (filing 12), and no such motion was filed by the State of Nebraska. Rust moved to expand the record to include the records in **Rust v. Gunter,** Docket 416, Page 61, District Court of Douglas County, Nebraska, **aff'd, Rust v. Gunter,** 228 Neb. 141, 421 N.W.2d 458 (1988). Because the state habeas corpus case dealt with conditions of confinement which had not been exhausted Rust was not allowed to amend his petition to assert the claim (filing 24), and the motion to expand the record was mooted. The following briefs were received by Judge Piester: Brief of Petitioner (October 6, 1988); Brief Of

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[2] Therefore, when I cite to exhibits, those citations refer to the exhibits included in this list.

Respondent (January 26, 1989); and Reply Brief Of Petitioner (February 23, 1989). Neither Judge Urbom nor Magistrate Piester held an evidentiary hearing.

On May 26, 1989, the court entered a standing order "In the Matter of the Assignment of Habeas Corpus Petitions Involving Claims of State Prisoners under Sentence of Death," and pursuant to that order this case was assigned to Judge William G. Cambridge (filings 41 and 42). Rust objected to the reassignment (filing 45), and I now recommend that this objection be denied.[3] Pursuant

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[3] Apparently, Rust believes that Judge Urbom is so familiar with the issues raised in this case due to his involvement in the first federal habeas action filed by Rust, that this case should continue to be assigned to Judge Urbom. Furthermore, Rust argues that Judge Urbom is familiar with his decision in **Holtan v. Black,** CV 84-L-393 (D. Neb. Nov. 5, 1986) (available on LEXIS, Genfed library, Dist file) (filings 40 and 41), **aff'd in part and rev'd in part, Holtan v. Black,** 838 F.2d 984, 986 (8th Cir. 1988), and that decision raises an identical issue to one raised in Rust's case. Accordingly, and particularly given the provision of Local Rule of Practice 11(E) which provides that refiled cases are assigned to the same judge who drew the dismissed case, Rust argues that his case should be reassigned to Judge Urbom. I disagree. There has been no consideration of Rust's case on the merits by Judge Urbom or Magistrate Piester. The so-called **Holtan** issue requires no particular familiarity with either the factual setting in this case or in **Holtan.** The reassignment order in this case states, and I see no reason to disagree, that reassignment was effectuated because there had been no consideration of this case on the merits, and reassignment would more equitably distribute the case load in death cases (filing 41). Thus it was perfectly proper to deviate from the normal assignment practice provided in the Local Rules of Practice, as the interests of justice dictated such a deviation. **See** Local Rule of Practice 50.

to the court's operating procedures, the matter was referred to me for findings and recommendations.

A preliminary pretrial conference was held on August 3, 1989. (Filings 46 and 47). This pretrial conference was continued until August 23, 1989 in order to: (a) give the Nebraska Attorney General's Office time to prepare a statement as to why it was unable to make the same concession it made in **Holtan,** 838 F.2d at 986 (stating "[a]s the State concedes, the sentencing panel's failure to ascertain whether the State had demonstrated aggravating circumstances beyond a reasonable doubt requires this case to be remanded"), regarding the conduct of the sentencing panel in this case; and (b) give the parties time to prepare a statement as to whether the sentencing issues raised in light of **Holtan** should be bifurcated from issues of trial error in light of the admonition of Chief Judge Lay, writing for the panel in **Holtan, id.** at 986 n.3 (stating that "[f]ederal courts must avoid passing upon constitutional questions unless they are essential to the disposition of the issues before them"), that the district court should avoid reaching issues which are necessarily intertwined with sentencing issues, if resentencing is otherwise required in state court. (Filing 48).

On August 23, 1989, the State of Nebraska conceded that in this case "[t]he sentencing records are silent as to what standard was applied by the three-judge panel that imposed the death sentence in this case." (Filing 53, Tr. 4:22-25). The State of Nebraska further admitted that it intended to make the concession in **Holtan** that a silent record as in Rust required resentencing; the State of Nebraska stated: "That's exactly what the State did in the

State's brief filed with the Eighth Circuit in the introduction. The State states very clearly that we are not challenging that portion of Judge Urbom's finding [in **Holtan**]." (Filing 53, Tr. 6:24-25; 7:1-2).

But the State of Nebraska argued that it should not be bound by the **Holtan** concession in this case: "I do not feel that we should be bound by either, reluctant to say, sloppy work that occurred previously within my office, or by a failure to challenge an issue that we should have challenged at that time." (Filing 53, Tr. 7:11-14).[4] The State of Nebraska explained that the concession made in **Holtan** was intentional in the sense that the State wanted to avoid a ruling on the constitutionality of a portion of the Nebraska death penalty statute. (Filing 53, Tr. 6:3-6). The State also argued that Judge Urbom was wrong as a matter of law and as a consequence the concession which the State made in **Holtan** created incorrect law, because there are no "cases that say that it is absolutely constitutionally required that the aggravating circumstances be found beyond a reasonable doubt." (Filing 53, Tr. 6:10-12).

The State argued that, even if this case required resentencing, this court should address all issues presented to it at once and not bifurcate consideration of the issues regarding sentencing and trial issues. (Filing 53, Tr. 7:19-8:19; 9:1-15; 12:18-13:7; 14:10). The State further argued that no evidentiary hearing was required on any issue. (Filing 53, Tr. 7:19-8:19; 9:1-15; 12:18-13:7; 14:10). Rust argued that the issues should be bifurcated and that

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[4] Present counsel for the State of Nebraska did not participate in **Holtan**, and she did not write the brief of the respondent received on January 26, 1989.

no evidentiary hearing was required on the Holtan issue. (Filing 53, Tr. 7:19-9:12; 12:18-13:8), but if all issues were to be considered at the same time then an evidentiary hearing lasting approximately two (2) days would be required regarding prosecutorial discretion in seeking the death penalty. (Filing 53, Tr. 7:19-9:12; 12:18-13:8). I indicated to the parties that regardless of my decision on the bifurcation issue, I would issue findings and recommendations so that either party could obtain a fairly quick de novo review of my decision by a district judge, and both parties agreed that this approach was appropriate. (Filing 53, Tr. 14:17-15:16).

I entered an order summarizing the position of the parties at the preliminary pretrial conference (filing 50) and gave each party time to object to the order, noting that in the absence of such objection the court could subsequently rely upon the order without fear of contradiction (filing 50, page 4 n.1). The order essentially recounted what took place at the continued preliminary pretrial conference as recited above. I also gave the parties leave to file supplemental briefs. (Filing 50, page 4 n.1). The State did not object to the order. Rust did not object to the substance of the order, but rather argued that the State had waived its arguments on the **Holtan** issue and alternatively sought additional time to respond to the State's supplemental brief. (Filing 51). Rust was given additional time to file his brief. (Filing 52).

On August 30, 1989 I received the supplemental brief of the respondent. On September 22, 1989 I received the petitioner's response to the petitioner's supplemental brief. On October 17, 1989 I became aware that a state

sentencing panel had resentenced Holtan to life imprisonment instead of the death penalty. I requested that Rust obtain a copy of the memorandum, consult with the State to determine whether the State objected to providing me with a copy, and if not, to submit a copy of the sentencing memorandum. On October 30, 1989 I received a true copy of the sentencing memorandum from petitioner's counsel with the representation that counsel for the State had stipulated to providing me with the memorandum in **Holtan.** I now take judicial notice of that sentencing memorandum. (Filing 54 (**State v. Holtan,** Doc. 092, No. 634 (District Court of Douglas County, Neb., Oct. 17, 1989) (Order of Resentence)). I herewith deliver the sentencing memorandum to the Clerk of the Court and direct him to file the memorandum with these findings and recommendations.

C. Petitioner's Issues and *Holtan* Exhaustion

The **Holtan** issue is set forth in Rust's amended petition as follows:

> A. REASONABLE DOUBT AS TO AGGRAVATING CIRCUMSTANCES.
>
> The imposition of the death penalty upon Petitioner violated his Fifth and FourteenthAmendment rights to due process of law in that the aggravating factors found by the three-judge sentencing panel were not found by that panel under a beyond-a-reasonable-doubt standard. The standard apparently applied by the sentencing panel was that standard enunciated in *Grandsinger v. State,* 161 Neb. 419, 73 N.W.2d 632 (1955). However, the beyond-a-reasonable-

> doubt standard was first applied to the Petitioner in his direct appeal to the Nebraska Supreme Court. The Petitioner's Motion for Rehearing, which specifically addressed this issue, was denied without opinion on March 18, 1977, Motion of Appellant for Rehearing and Brief in Support Thereof (Issues V and VI, pgs. 10-12), (Case No. 40451), *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

(Filing 31, page 23).

The **Holtan** issue was explicitly presented to the Nebraska Supreme Court in the brief on the motion for reconsideration in the following manner:

> V.
>
> **The interests of justice and due process require that the sentence in this case be vacated and remanded for resentence in conformity with the opinion of this Court that the aggravatinq circumstances must be found beyond a reasonable doubt.**
>
> This Court has overruled the rule in *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955) that reasonable doubt has no application in the determination of sentence in capital cases and substituted the rule that "the facts upon which the aggravating circumstances . . . are based be proved beyond a reasonable doubt." *State v. Simants*, 66 SCJ at 560, incorporated by reference in *State v. Rust* and *State v. Holtan*. It is very probable that the trial court found the aggravating circumstances using the rule in *Grandsinger* which this Court has expressly overruled as not applicable to our present law. Since

> the trial court or panel is the trier of facts as to the aggravating circumstances, this Court has no way of knowing whether the trial court found these circumstances beyond a reasonable doubt and must vacate and remand for a proper sentencing determination.

(Exh. 9, page 10).

In Rust's brief he presents a wide variety of issues besides the **Holtan** issue, which, to the extent they can be summarized, are as follows:

> CLAIM 12B – INEFFECTIVE ASSISTANCE OF COUNSEL
>
> . . . .
>
> Petitioner is in custody, pursuant to a conviction and sentence obtained in violation of his constitutional right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments.
>
> . . . .
>
> 12C – FAIR AND IMPARTIAL JURY
>
> . . . .
>
> Petitioner's Sixth and Fourteenth Amendment Constitutional rights were violated during the voir dire examination, in that the trial judge excused a prospective juror, upon his own motion, simply because the juror expressed some concern about the death penalty.
>
> . . . .
>
> Petitioner's conviction and sentence of death were also rendered in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States in that he was

convicted by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution and the co-defendant on the issue of Petitioner's guilt of the crimes with which he was charged.

. . . .

CLAIM 12D - GENERAL TRIAL ERROR

. . . .

Petitioner's conviction and death sentence were rendered in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, due to the improper comments by the prosecution regarding Petitioner's exercise of his privilege against self-incrimination by his failure to testify in his own behalf.

. . . .

Petitioner's conviction and death sentence were rendered in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, due to the fact that the trial judge overruled defense motions for the following:

(a) complete sequestration of the jury during voir dire examination; (Ex. 1, p.17; Exs. 55 and 56 and filing No. 28), sustained (Ex. 56 p.2);

(b) sequestration of the jury during trial, (Exs. 55 and 56);

(c) continuance of the trial; (Ex. 1, p. 20; Exs. 55 and 56, and filing No. 22); and

(d) change of venue. (Ex. 1, pp. 8, 17-18; Exs. 55 and 56, and filing No. 34).

. . . .

12E – GENERAL SENTENCING ERROR

. . . .

(a) Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States in that the sentencing panel received into evidence and relied upon certain information relating to the prior juvenile record of Petitioner after such information had been deleted from the record.

. . . .

Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that a presentence investigation was admitted into evidence and considered by the sentencing panel.

. . . .

Petitioner's sentence of death was imposed in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that Petitioner received a sentence of death while his co-defendant received a sentence of life imprisonment.

. . . .

CLAIM 12F – FELONY MURDER

. . . .

This claim is based, inter alia, on the following:

(1) Petitioner was charged and convicted of the crime of "felony murder," specifically,

that he killed Michael Kellog in the perpetration or attempt to perpetrate a robbery.

(2) Felony murder provides that a homicide occurring during the perpetration or attempt to perpetrate a robbery is murder in the first degree.

(3) Felony murder provides that the turpitude involved in a robbery takes the place of deliberate, premeditated malice and the intent to kill is conclusively presumed from the criminal intention required for robbery.

(4) Felony murder permits conviction and possible capital punishment for all homicides committed in the perpetration or attempt to perpetrate certain prescribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind.

(5) Petitioner was denied the opportunity to submit "lesser-included offense" instructions for the jury's consideration during the guilt-innocence phase of his capital trial. (Based on existing Nebraska law in felony murder cases).

(6) The absence of "lesser-included offense" instructions, when a proper factual basis was present, unconstitutionally increased the risk that the jury could convict the petitioner when forced into an all-or-nothing choice between capital murder and innocence.

. . . .

CLAIM G - CRUEL AND UNUSUAL PUNISHMENT FURMAN CHALLENGES

. . . .

The imposition and execution of Petitioner's death sentence under Nebraska law and practice violate the constitutional rights guaranteed him by the Eighth and Fourteenth Amendments to the Constitution of the United States.

CLAIM 12H - NEBRASKA DEATH PENALTY STATUTES

. . . .

The arbitrary and capricious application of Nebraska's death penalty statutes violates Petitioner's rights to due process and equal protection as guaranteed him by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

. . . .

Said statutes (specifically those listed below as (a) through (e)) were applied to Petitioner in violation of his rights to due process and equal protection as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States:

(a) NEB. REV. STAT. § 29-2523(1)(a);

(b) NEB. REV. STAT. § 29-2523(1)(b);

(c) NEB. REV. STAT. § 29-2523(1)(f);

(d) NEB. REV. STAT. § 29-2523(1)(h); and

(e) NEB. REV. STAT. § 29-2523(2).

. . . .

CLAIM 12 I – COMPARATIVE REVIEW OF A SENTENCE OF DEATH

. . . .

CLAIM 12J – TRIAL ERROR – SUPPLEMENTAL POST CONVICTION

. . . .

CLAIM 12K – APPELLATE ISSUES NOT ADDRESSED

. . . .

Brief of Petitioner at 6-58.

As to each claim, Rust endeavored to show that each claim had been exhausted. **Id.** Claim 12A presents the so-called **Holtan** issue. **Id.** at 3. As to Claim 12A, Rust's brief provides:

> This claim was presented to the Nebraska Supreme Court by way of Motion for Rehearing.
>
> (Ex. #9, Motion of Appellant for Rehearing and Brief in Support Thereof, pgs. 10-12).
>
> Petitioner's Motion was summarily dismissed by the Nebraska Supreme Court on March 18, 1977. (Ex. 18 – Card/Order).
>
> Petitioner's claim as to this issue was raised and addressed in the same manner as was the "reasonable doubt" claim of Richard Dean Holtan. Such claim was discussed and recognized by Judge Urbom in *Holtan v. Black*, CV84-L-893, (D. Neb.) report and recommendation dated June 25, 1986, *adopted*, unpublished memorandum of decision dated November 5, 1986 (Urbom, J.) rev'd. on other grounds, 838 F.2d 984 (8th Cir.) at 10-12.

Id.

In its initial brief the State of Nebraska did not claim that the **Holtan** issue was unexhausted, but rather argued that the Nebraska Supreme Court had specifically found that the "beyond-the-reasonable-doubt" standard had been applied by the sentencing panel. Brief of Respondent at 1-3. The State of Nebraska also did not argue that the **Holtan** issue had not been "fairly presented" to the state courts; rather, the State argued that when the issue had been presented to the Nebraska Supreme Court and "that court finds the requirement has been satisfied it should be honored by all courts." **Id.** at 3. But in its supplemental brief the State argued that the **Holtan** issue was, although technically exhausted, not fairly presented to the Nebraska state courts since it was raised only once in a motion for rehearing addressed to the Nebraska Supreme Court in the direct appeal from conviction, and even then the way the issue was framed the Nebraska Supreme Court was not fairly confronted with the constitutional question. Supplemental Brief of Respondent at 11-26.

Rust has specifically responded to the argument advanced by the State that Rust has not fairly presented the **Holtan** issue. Petitioner's Response to Supplemental Brief at 2-8. But Rust also objected to the State being allowed to change its position regarding the question of whether the **Holtan** issue had been fairly presented. **Id.** at 1.

II. Findings of Fact[5]

On August 1, 1975 Rust was found guilty by a jury of first-degree murder in that he was found to have killed a person while perpetrating or attempting to perpetrate a robbery. As a result of that conviction a three-judge sentencing panel was convened in order to determine whether the death penalty should be invoked.

Under Nebraska law when a defendant is found guilty of murder, a sentencing hearing is held before at least one district judge and as many as three district judges. **Neb. Rev. Stat.** § 29-2520 (Supp. 1974). Evidence is then taken on any matter that the judge or judges deem relevant and must include matters relating to statutory aggravating and mitigating circumstances. **Id.** § 29-2521. **See id.** § 29-2523 (listing the statutory aggravating and mitigating circumstances). Both the State and defendant are then permitted to present argument for or against the death sentence. **Id.** The judge or judges present at the evidentiary hearing then fix the sentence by "written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in [the] determination." **Id.** § 29-2522.

The specific statutory task of the three-judge sentencing panel was to determine whether certain aggravating and mitigating circumstances existed, and if so, whether on balance the death penalty or life imprisonment was

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[5] To the extent that these findings of fact are more properly considered conclusions of law it is my intent that they shall be so considered, and I so conclude.

justified, taking into consideration these factors. **Id.** The sentencing panel described the applicable law as follows:

> § 29-2519 in part provides: ". . . the death penalty . . . shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances. . . . " § 29-2522, in substance, provides that in first degree murder cases the judge(s) shall fix the sentence at either death or life imprisonment based upon "(1) whether sufficient aggravating circumstances exist to impose a sentence of death: or (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances."

(Exh. 5 (Order of Sentence), page 1).

The sentencing panel found four aggravating circumstances summarized here as: previous violent crime; murder to conceal the commission of a crime or the identity of the defendant; knowing creation of a great risk of death; and commission to disrupt or hinder enforcement of the law. The sentencing panel found one mitigating circumstance – extreme mental or emotional disturbance (Exhibit 5 (Order of Sentence), pages 3-8). The sentencing panel discussed each aggravating and mitigating circumstance, and the panel unanimously found as follows:

V.

> As to aggravating circumstances, the statutory definitions of which are hereinafter set forth, the Court finds as follows:

(a)

"The offender was previously convicted of another murder or crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity";

This defendant has never been previously convicted of another murder. The defendant was convicted on January 21, 1970, in the Circuit Court of Minnehaha County, South Dakota, of Assault with intent to inflict great bodily harm (Count II) and of Grand Larceny (Count III), and was sentenced to imprisonment for concurrent terms of 5 and 10 years respectively in the South Dakota State Penitentiary. The crimes involved the theft of a friend's automobile, after the defendant threatened the victim with a bayonet and his companion held the victim with a chain around his neck. The defendant drove the victim's automobile to a remote area near Sioux Falls, where the victim was removed from the car, and the defendant struck him about the head with a bayonet handle and a tire iron until he was unconscious. Defendant and his companion then robbed the victim and dumped him, bleeding and semi-conscious, into the trunk of his own automobile and drove away. The victim was able to escape from the trunk of the moving automobile and was treated at a hospital. Seventeen stitches were required to close the wounds inflicted. The conviction for assault with intent to inflict great bodily harm constitutes a crime involving the use of violence to the person within the statutory definition of the circumstance.

The defendant's remaining criminal record as it existed prior to February 21, 1975, included:

(1) Conviction for unlawful possession of a firearm, Federal District Court, Sioux Falls, South Dakota, and sentence on 10/3/69 to two years probation;

(2) Conviction for petit larceny, Hall County, Nebraska, 12/17/69, fined $50.00 and costs;

(3) Conviction for speeding, Sioux Falls, South Dakota, 4/4/74, fined $16.50.

We do not regard this total criminal record as constituting a substantial history of serious assaultive or terrorizing criminal activity within the meaning of the statutory definition.

This aggravating circumstance does exist.

(b)

"The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;"

The evidence conclusively establishes that at the time of the murder of Michael Kellog, the defendant was attempting to escape capture after participating in an armed robbery of a supermarket at 30th and Weber in Omaha, Nebraska, and after having engaged in a running gun battle with officers of the Omaha Police Department during which time he fired numerous shots at Police Officers George E. Allen and Joseph Nepodal. Following the murder of Michael Kellog, the defendant shot and

wounded Police Officer Russell Wolf. Concurrently with his trial for murder, he was convicted of three counts of shooting with intent to kill, wound or maim the three police officers. The court finds that the murder of Michael Kellog was committed by the defendant to conceal the commission of these crimes and to conceal the identity of this defendant.

This aggravating circumstance does exits.

(c)

"The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;"

This circumstance is intended to apply to murder actually committed by another at the instance and request of the defendant. This murder was not so committed.

This aggravating circumstance does not exist.

(d)

"The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence;"

The evidence discloses that the victim Michael Kellog fired his weapon at the defendant as he was about to go over the fence. The defendant thereupon fired his Beretta .32 caliber automatic pistol at Kellog which struck him and caused him to fall to the ground. Instead of

continuing with his escape, the defendant thereafter deliberately fired two more shots at Kellog while he was wounded and lying on the ground. The autopsy report corroborates that Kellog was shot three times. The court finds that these facts substantiate that the defendant deliberately and viciously murdered Michael Kellog. We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed, but by the use of the words "especially" and "exceptional" the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. Here the murder was effected by three bullets causing almost instantaneous death and the imposition of extreme suffering on the victim was not involved. It is a close question as to whether this particular aggravating circumstance exists. In view of our foregoing interpretation of the application of this aggravating circumstance, we find this aggravating circumstance does not exist.

This aggravating circumstance does not exist.

(e)

"At the time the murder was committed, the offender also committed another murder;"

A companion of the defendant, one Donald Fread, was killed by police fire during the gun battle which preceded the murder of Michael Kellog by defendant. Police Officer Russell Wolf

was wounded by the defendant immediately after the murder in question under circumstances evidencing an intent on the part of defendant to kill Officer Wolf. We do not consider either of these circumstances to come within statutory definition (e).

This aggravating circumstance does not exist.

(f)

"The offender knowingly created a great risk of death to at least several persons;"

The evidence established that defendant fired repeatedly at Police Officers Allen, Nepodal and Wolf, using a sawed off shotgun and shells loaded with deer-slugs, and a Beretta .32 caliber automatic pistol. Shots were fired by defendant and his co-defendant Ronald Raymond Ell at Officer Allen's police car over a chase extending a number of blocks in a heavily populated residential area of Omaha. The windshield of Officer Allen's car was pierced twice by shots from the fleeing robbers, narrowly missing Officer Allen. The inference seems to be clear that the defendant was shooting at Office Allen and not at his car. Two police cruisers were struck by gunfire. Officer Allen received a head wound. The defendant shot repeatedly at Officers Allen and Nepodal after the robber's car was trapped on Iowa Street during a time when bystanders were numerous. Defendant shot both Michael Kellog and Officer Wolf while hiding in the yard of a residence. Residents in their homes were subjected to great risk of being struck by stray gunfire. The defendant knowingly created great risk of death to at least three

police officers and many other civilians. He demonstrated an utter disregard for human life, and a willingness to shoot and kill anyone who got in the way of his escape.

This aggravating circumstance does exist, to a great degree.

(g)

"The victim was a law enforcement officer or a public servant having custody of the offender or another;"

The victim Michael Kellog was a civilian who volunteered to help a police officer whom he knew, in apprehending a desperate criminal. His actions, although they resulted in the containment of the defendant in the yard where he was finally apprehended, were not those of a law enforcement officer, and we cannot characterize him as such; neither was he a public servant having custody of the defendant when he was killed.

This aggravating circumstance does not exist.

(h)

"The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws;"

The murder was committed during an attempt to escape from the crime of armed robbery. Many officers of the Omaha Police Department were carrying out their duty as law enforcement officers in a massive effort to

apprehend and arrest the defendant and his companions. Michael Kellog joined in that effort. The conduct of the defendant in committing the murder of Michael Kellog was a direct attempt to disrupt and hinder the lawful exercise of a proper governmental function.

This aggravating circumstance does exist.

VI.

As to mitigating circumstances, the court finds as follows:

(a)

"The offender has no significant history of prior criminal activity;"

We have previously detailed the prior criminal record of the defendant. It constitutes a significant history of prior criminal activity.

This mitigating circumstance does not exist.

(b)

"The offender acted under unusual pressures or influences or under the domination of another person;"

At the moment of the murder the defendant did not act under the domination of another person. The defendant was acting under pressures; and in view of the armed robbery, the chase and the gun battle, they were unusual. The pressures were, however, of his own making. It appears that the legislature intended that these pressures be restricted to external pressures not of his own making.

This mitigating circumstance does not exist.

(c)

"The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;"

Here again we must look to the time of the murder. The defendant had just taken part in an armed robbery; he had been in a running gun battle; the diver [sic] of his getaway car had been killed; the victim had fired three shots at him; he was cornered. At this point any normal person would have had to be under the influence of extreme mental or emotional disturbance. This defendant had physical defects from birth and a history of social rejection for most of his life such as to lead to emotional instability. While defendant's own actions were principally responsible for placing him in that position of extreme emotional disturbance, we must find that this crime was not one of cold calculation, but of emotional feelings.

This mitigating circumstances does exist.

(d)

"The age of the defendant at the time of the crime;"

This circumstance refers to a case where youth or the extreme age of the defendant might mitigate the crime. Here the defendant was a mature man of the age of 23 years on February 21, 1975.

This mitigating circumstance does not exist.

(e)

"The offender was an accomplice in the crime committed by another person and his participation was relatively minor;"

The participation of the defendant in this crime was major.

This mitigating circumstance does not exist.

(f)

"The victim was a participant in the defendant's conduct or consented to the act;"

This mitigating circumstance does not exist.

(g)

"At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication;"

The defendant was not intoxicated. The defendant had no mental illness in a legal sense, and knew the difference between right and wrong. The actions of the defendant make it clear that he had a mental defect as that term is commonly used, but in that sense all persons who commit such crimes have a mental defect. We are confident, however, that the legislature intended the words "mental defect" to mean a medically definable psychosis, feeble mindedness or a like defect controlling the mind and makeup of the defendant.

This mitigating circumstance does not exist.

(Exh. 5 (Order of Sentence), pages 3-8).

In just three sentences the panel balanced the factors and concluded that the aggravating factors outweighed the mitigating factors:

VII.

The court finds that four of the eight Statutory aggravating circumstances are applicable, and that sufficient aggravating circumstances exist to justify imposition of a sentence of death.

The court further finds that only one of the seven Statutory mitigating circumstances is applicable, and that sufficient mitigating circumstances do not exist to approach or exceed the weight given to the aggravating circumstances.

The court further finds that the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances as set forth in §§ 29-2520 to 29-2524, R.S. Supp., 1974.

(Exh. 5 (Order of Sentence), pages 8-9).

Nebraska law requires that any sentence of death be reviewed by that state's supreme court. **Neb. Rev. Stat.** § 29-2524 (Supp. 1974). Prior to four opinions issued by the Nebraska Supreme Court on February 2, 1977, the law in Nebraska was clear that "[t]he doctrine of reasonable doubt has no application to the jury's determination of the penalty to be imposed." **Grandsinger v. State**, 161 Neb. 419, 443, 73 N.W.2d 632, 648 (1955), **cert. denied**, 352 U.S. 880 (1956). The **Grandsinger** doctrine was the Nebraska law at the time Rust's case was appealed to the Nebraska Supreme Court. There were no cases stating

what the standard was for judge-decided death penalty cases. The then new death penalty statutes did not define the burden of proof. In his brief on direct appeal Rust did not challenge the burden-of-proof standard used by the sentencing panel. (Exh. 6 (Brief of Appellant)).

On the same day the Rust opinion was announced the Nebraska Supreme Court adopted a new burden-of-proof standard, rejecting the **Grandsinger** standard. Instead the court found that, because of the importance placed on aggravating circumstances in the then new statutory scheme, aggravating circumstances must be proved beyond a reasonable doubt if the intent of the new statute[6] was to be properly implemented. **State v. Simants,** 197 Neb. 549, 559-60, 250 N.W.2d 881, 888, **cert. denied,** 434 U.S. 878 (1977). But applying what was essentially harmless-error analysis, the Nebraska Supreme Court on the same day in **Simants, id., Rust,** 197 Neb. at 543, 250 N.W.2d at 876, and **State v. Holtan,** 197 Neb. 544, 549, 250 N.W.2d 876, 881, **cert. denied,** 434 U.S. 912 (1977), held that, despite the fact that the court had just announced the "beyond-a-reasonable-doubt" standard, it was, nevertheless, satisfied from its review of the evidence in each case that the facts upon which the finding of the existence of each aggravating factor depended were proved beyond a reasonable doubt. Hence, according to the Nebraska Supreme Court, there was no reason for reversal, even though it was not clear what standard

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[6] The statute, **Neb. Rev. Stat.** § 29-2522 (Supp. 1974), intended to require that aggravating circumstances be shown by "strong proof."

of proof each of the sentencing panels employed in determining whether aggravating circumstances had been established. However, on that same day in **State v. Stewart,** 197 Neb. 497, 250 N.W.2d 849 (1977), **overruled on other grounds, State v. Palmer,** 224 Neb. 282, 399 N.W.2d 706 (1986), **cert. denied,** 484 U.S. 872 (1987), the court in applying the new standard and emphasizing its importance, **Stewart,** 197 Neb. at 520, 250 N.W.2d at 863, modified the sentence from death to life imprisonment. **Id.** at 527-28, 250 N.W.2d at 866-67.

Rust's counsel on appeal then moved for a rehearing, arguing that the interests of justice and due process required that the sentence be vacated and the case be remanded for resentencing in light of the Nebraska Supreme Court's holding that aggravating circumstances must be proved beyond a reasonable doubt. (Exh. 9 (Motion for Rehearing), page 2; Exh. 9 (Brief in Support of Motion. for Rehearing), page 10). In the brief Rust advised the Nebraska Supreme Court that there was no way to determine whether the sentencing panel applied the correct standard and that it was probable that the sentencing panel employed the **Grandsinger** standard; the proposition of law advanced by Rust to the Nebraska Supreme Court was that, among other things, the "interests of justice and due process" required resentencing in light of the court's new ruling. (Exh. 9 (Brief in Support of Motion for Rehearing), page 10). The parties agree that the Nebraska Supreme Court summarily denied the motion for rehearing without opinion. Supplemental Brief of Respondent at 10; Petitioner's Response to Supplemental Brief at 5. The matter was never again presented to the Nebraska courts by Rust. (Exhs. 12-54).

III. Conclusions of Law?[7]

A. The *Holtan* Issue was Fairly Presented

The State of Nebraska argues that the **Holtan** issue was never "fairly presented" to the Nebraska court and, thus, although Rust has no non-futile state remedies available to him now, since Rust has failed to show cause or prejudice for the failure to present his claim, the claim must be dismissed. Supplemental Brief of Respondent at 11-26 (citing **Smittie v. Lockhart,** 843 F.2d 295, 296 (8th Cir. 1988); **Laws v. Armontrout,** 834 F.2d 1401, 1412 (8th Cir. 1987), **cert. denied,** 109 S. Ct. 1944 (1989)). I disagree, for among other reasons, because not only did the highest court in the State of Nebraska have a "fair opportunity" to decide the question, but that same court was fully responsible for first raising and first framing the issue in Rust's case.

As I understand the specifics of the State's arguments they are threefold. First, various procedural bars existed which the Nebraska Supreme Court could have used to deny review of Rust's claim, e.g., the matter was not first presented to the trial court, the matter was not assigned as error in the initial brief to the Supreme Court on appeal, and, even if assigned as error in the initial brief, it was not discussed therein. Supplemental Brief of Respondent at 16-20. Second, the opinion of the Nebraska Supreme Court was founded upon state law and not federal constitutional law. **Id.** at 20. Third, the State

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[7] To the extent the conclusions of law set forth herein are more properly considered as findings of fact it is my intention that they shall be so considered, and I so find.

argues that the issue as presented here was not presented to the Nebraska Supreme Court on similar legal and factual grounds, and thus the Nebraska Supreme Court had no real opportunity to consider the issue now before this court. **Id.** at 15, 25-26.

As to the first and second arguments advanced by the State, since the prime purpose of requiring that an issue be "fairly presented" to the state court before consideration in the federal court is to allow the state court a chance to correct federal constitutional error committed by a state court, **Laws,** 834 F.2d at 1412, if the state court has reached the federal constitutional question despite a possible state procedural bar, there is no reason to deny federal review as long as the state court does not explicitly invoke the state procedural bar. **Harris v. Reed,** 57 U.S.L.W. 4224, 4226 (U.S. Feb. 22, 1989) (holding, in the habeas corpus context, that, if it fairly appears that the state court rested its decision primarily on federal law the federal courts may reach the federal question on review unless the state court's opinion contains a "plain statement" that its decision is based on an independent state procedural bar). In this case it is clear that the Nebraska court did not rely upon a state procedural bar, and the Nebraska court resolved the issue on federal constitutional grounds.

In **Simants,** the Nebraska Supreme Court was explicitly confronted with the claim that the pertinent statute was silent as to the burden of proof and therefore the pertinent statute was constitutionally defective: "Defendant argues that the Nebraska death penalty procedures are **constitutionally** invalid because they are silent as to

what burden must be met before an aggravating circumstance is proven to exist by the sentencing authority." **Simants,** 197 Neb. at 559, 250 N.W.2d at 888 (emphasis added). In order to meet this challenge, the Nebraska Supreme Court found that the lack of guidance in the statute as to what standard should be employed was not constitutionally fatal because the court read into the statute a requirement that the proof must be beyond a reasonable doubt, and, the "aggravating circumstances found to exist here were clearly found to exist beyond a reasonable doubt." **Id.** The Nebraska Supreme Court cited and relied upon **Woodson v. North Carolina,** 428 U.S. 280 (1976) for the proposition that the death penalty requires "strong proof" of aggravating circumstances. **Woodson,** 428 U.S. at 305. In making its finding, the Nebraska Supreme Court found that the previous precedent of **Grandsinger v. State**, 161 Neb. 419, 73 N.W.2d 632 (1955), **cert. denied**, 352 U.S. 880 (1956), holding that proof beyond a reasonable doubt did not apply to a jury's determination of a death sentence, was not applicable and would not be applied to the then new statutory scheme that utilized judges to impose the death penalty. **Simants**, 197 Neb. at 559, 250 N.W.2d at 888.

While Rust did not raise the issue identified in **Simants** in his first brief to the Nebraska Supreme Court, the Nebraska Supreme Court raised the issue itself stating: "We have today held in **Simants, in response to a constitutional challenge**, that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt." **Rust**, 197 Neb. at 543, 250 N.W.2d at 876 (emphasis added). The Nebraska Supreme Court went on to hold in **Rust** that a review of the

evidence in Rust's case convinced the court that the facts upon which the finding of the existence of each aggravating circumstance depended were proved beyond a reasonable doubt, and that court so found. **Id.** In so doing, the court noted that it applied the same standard of reasonable doubt as applicable to the burden of proof in a criminal case. **Id.** At the end of the discussion in **Rust, id.**, the court cited **Chapman v. California**, 386 U.S. 18, 23-24 (1967). **Chapman** stands for the proposition that, under certain circumstances, federal constitutional error may be overlooked in a criminal case if the error was harmless beyond a reasonable doubt. **Chapman**, 386 U.S. at 23-24.

In light of the opinion in **Rust**, counsel for Rust asked the Nebraska Supreme Court to reconsider. (Exh. 9). It was plainly argued to the Nebraska Supreme Court that "due process" required resentencing, particularly because "[i]t is very probable that the trial court found the aggravating circumstances using the rule in **Grandsinger** which this Court has expressly overruled as not applicable to our present law" and "[s]ince the trial court or panel is the trier of facts as to the aggravating circumstances, this Court has no way of knowing whether the trial court found these circumstances beyond a reasonable doubt." (Exh. 9, page 10). Without stating the existence of any state procedural bar, the Nebraska Supreme Court summarily denied the motion for reconsideration.

It appears that the Nebraska Supreme Court believed that the **Simants** claim and the claim discussed by the court in **Rust**, were founded upon federal constitutional grounds, because the court said it was confronted with a constitutional challenge, it relied upon **Woodson v. North**

Carolina, 428 U.S. 280 (1976), a case dealing with the death penalty, and the court, in citing **Chapman**, recognized that any error was federal in nature.[8] Moreover, nowhere in either the **Simants** or the **Rust** opinions or in the order of the **Rust** court summarily denying the motion for rehearing did the Nebraska Supreme Court rely upon any state procedural bar, e.g., constitutional issues must be first raised at the district court level, matters not assigned as error in the original appellate brief will not be considered, or matters assigned as error but not briefed will not be considered.

Next, the question thus becomes whether the issue considered in **Simants**, incorporated by reference and amplified in **Rust** and argued by Rust in his motion for reconsideration to the Nebraska Supreme Court, is sufficiently close to the issue presented here that the issue can be said to have been fairly presented to the Nebraska Supreme Court in the sense that the state court had a meaningful opportunity to correct the alleged federal constitutional error.

While the issue raised in claim 12A in this case is not word-for-word what the Nebraska Supreme Court explicitly considered in **Simants** and **Rust** and is not word-for-word what Rust wrote in his motion for reconsideration and brief addressed to the Nebraska Supreme Court, the issues are sufficiently close both legally and factually so that it may be confidently said that the Nebraska

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[8] The court also cited **State v. Rice**, 188 Neb. 728, 751, 199 N.W.2d 480, 494 (1972), **cert. denied**, 430 U.S. 947 (1977); that decision simply cites and relies upon the harmless-error analysis of **Chapman**.

Supreme Court was fairly presented with the issue now presented here. It is helpful to compare the exact language used by the Nebraska Supreme Court in **Rust, Simants** and the language used by Rust when he addressed the Nebraska Supreme Court in the brief on the motion for reconsideration with the language Rust used in his amended petition for habeas corpus.

The language used by the **Rust** court is as follows:

> We have today held in *Simants*, in response to a constitutional challenge, that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. We are satisfied from our review of the evidence in this case that the facts upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find. In making such finding we have applied the same standard of reasonable doubt as applicable to the burden of proof in criminal cases. NJI No. 14.08. *See State v. Rice*, 188 Neb. 728, 751, 199 N.W.2d 480; *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065.

Rust, 197 Neb. at 751, 250 N.W.2d at 876.

The **Simants** language which the **Rust** court on its own motion applied follows:

> Defendant argues that the Nebraska death penalty procedures are constitutionally invalid because they are silent as to what burden must be met before an aggravating circumstance is proven to exist by the sentencing authority. He argues that aggravating circumstances must be proved to exist beyond a reasonable doubt. That

question is not involved in this case because the aggravating circumstances found to exist here were clearly found to exist beyond a reasonable doubt.

In *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955), this court said: "The doctrine of reasonable doubt has no application to the jury's determination as to the penalty to be imposed." That case was decided at a time when the jury determined whether the sentence should be death or life imprisonment in capital cases. The present statute has changed that rule. It may be forcibly argued that there is no reason or logic why a similar rule should not apply to judicial sentencing. However, the law has been substantially changed and the question should be reconsidered in regard to the imposition of the death penalty.

Section 29-2522, R.R.S. 1943, now requires a determination after hearing that sufficient aggravating circumstances exist to justify the imposition of a death penalty. As the United States Supreme Court noted in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed.2d 944 (1976): "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

We believe the obvious intent of the statute is that the enumerated aggravating circumstances should require strong proof. Aggravating circumstances are now a mandatory element to be considered in capital cases. The

> sentence depends upon the proof of some aggravating circumstance. We believe it is the intent of the act to require the facts upon which the aggravating circumstances referred to in section 29-2523, R.R.S. 1943, are based be proved beyond a reasonable doubt, and so construe it. We hold that the rule enunciated in *Grandsinger v. State. supra,* is not applicable to our present law.

Simants, 197 Neb. at 559, 250 N.W.2d at 888.

The language used by Rust in his motion for reconsideration before the Nebraska Supreme Court and in the brief in support thereof is as follows:

> V.
>
> **The interests of justice and due process require that the sentence in this case be vacated and remanded for resentence in conformity with the opinion of this Court that the aggravating circumstances must be found beyond a reasonable doubt.**
>
> This Court has overruled the rule in *Grandsinger v. State,* 161 Neb. 419, 73 N.W.2d 632 (1955) that reasonable doubt has no application in the determination of sentence in capital cases and substituted the rule that "the facts upon which the aggravating circumstances . . . are based be proved beyond a reasonable doubt." *State v. Simants,* 66 SCJ at 560, incorporated by reference in *State v. Rust* and *State v. Holtan.* It is very probable that the trial court found the aggravating circumstances using the rule in *Grandsinger* which this Court has expressly overruled as not applicable to our present law. Since

> the trial court or panel is the trier of facts as to the aggravating circumstances, this Court has no way of knowing whether the trial court found these circumstances beyond a reasonable doubt and must vacate and remand for a proper sentencing determination.

(Exh. 9, page 10).

The **Holtan** issue is set forth in Rust's amended petition as follows:

> The imposition of the death penalty upon Petitioner violated his Fifth and Fourteenth Amendment rights to due process of law in that the aggravating factors found by the three-judge sentencing panel were not found by that panel under a beyond-a-reasonable-doubt standard. The standard apparently applied by the sentencing panel was that standard enunciated in *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955). However, the beyond-a-reasonable-doubt standard was first applied to the Petitioner in his direct appeal to the Nebraska Supreme Court. The Petitioner's Motion for Rehearing, which specifically addressed this issue, was denied without opinion on March 18, 1977, Motion of Appellant for Rehearing and Brief in Support Thereof (Issues V and VI, pgs. 10-12), (Case No. 40451), *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

(Filing 31, page 23).

In **Rust**, the Nebraska Supreme Court had every legal and factual component of the argument presented in this case: a claimed due process violation arising out of a lack of direction to the sentencing panel because of the silence

of the statute and the existence of **Grandsinger**, the specification of the standard for the first time on appeal, and the application of that standard to the evidence in the case for the first time on appeal. This is all that was required to fairly present the matter. **Picard v. Connor**, 404 U.S. 270, 278 (1971) (stating that "[w]e simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts"); **Hall v. Iowa**, 705 F.2d 283, 287-88 (8th Cir.) (stating that the matter was fairly presented when the petitioner cited to a case predicated on the same grounds as the habeas petition), **cert. denied**, 464 U.S. 934 (1983); **Morrow v. Wyrick**, 646 F.2d 1229, 1232 (8th Cir.) (stating that the matter was fairly presented when the petitioner presented a basic argument of a constitutional issue and citations to state court cases in support of his argument), **cert. denied**, 454 U.S. 899 (1981).

This case is not like **Anderson v. Harless**, 459 U.S. 4 (1982). In that case a Michigan defendant presented the state courts with a challenge to a "malice" instruction claiming only that it was reversible error, and the defendant cited only to a Michigan case which raised no federal issues. **Anderson**, 459 U.S. at 5-6. The Supreme Court held that such an argument before the Michigan courts was not enough to fairly present the federal constitutional issue. **Id.** at 6. In the case at bar, however, there is simply no doubt that the Nebraska Supreme Court recognized that it was confronting a federal constitutional issue, since the court stated that it was confronted with a "constitutional challenge" and the court cited **Woodson**

and **Chapman**. Moreover, in the motion for reconsideration Rust argued that "due process" required resentencing.

Moreover, this case is unlike **Laws**, 834 F.2d at 1412-13. In that case the petitioner had asserted that he had been denied effective assistance of counsel in both state and federal court. But in the federal court the defendant presented a greatly expanded view of his mental condition, allegedly not investigated by counsel, arising out of his experiences during the war in Vietnam. Since the petitioner had not presented the state courts with the same factual underpinnings to the effective assistance of counsel claim as was presented to the federal court, the Eighth Circuit held that the issue had not been fairly presented. In contrast, here there was nothing lacking as a factual matter in the case presented to the Nebraska Supreme Court as compared to the case presented to this court.

Further, I do not find **Teague v. Lane**, 57 U.S.L.W. 4233, 4235-36 (U.S. Feb. 22, 1989), helpful. In that case, the petitioner had presented the state courts with a sixth amendment claim that the prosecutor had unconstitutionally struck potential black jurors from the panel by the use of peremptory challenges. **Teague**, 57 U.S.L.W. at 4234. Later, in the federal courts for the first time the petitioner argued that under the fourteenth amendment he also had the right to question the prosecutor once the prosecutor offered an explanation of the use of peremptory challenges and that he was denied that right. **Id.** at 4234-35. The Court held, as did the circuit court, that the later claim had not been presented to the state courts, and petitioner conceded that fact: "Petitioner candidly admits

that he did not raise the . . . claim at trial or on direct appeal." **Id. at 4236**. Essentially, the issue then became whether the state courts had inadvertently addressed the issue. Finding that the state court had not mentioned the fourteenth amendment and had not mentioned whether under prior Court precedent a prosecutor could be questioned about an explanation of a peremptory challenge, the Court concluded that the state court had not reached the federal issue. **Id.**

The concession in **Teague** distinguishes that case from this one. Moreover, in this case the filing with the Nebraska Supreme Court of Rust's motion for reconsideration and brief in support thereof, (Exh. 9), distinguishes **Teague**. Still further, and most importantly, because of the concession made in **Teague** there was virtually no discussion about what a "fair presentment" would constitute, and thus **Teague** provides little instruction on the issue before this court.

Finally, Judge Urbom confronted the identical issue presented here in **Holtan v. Black**, CV 84-L-393, slip op. (D. Neb. Nov. 5, 1986) (filing 40) (Memorandum of Decision) (available on LEXIS, Genfed library, Dist file), **aff'd in part and rev'd in part on other grounds, Holtan**, 838 F.2d 984 (8th Cir. 1988). Judge Urbom found as I have, stating:

> Holtan's conviction was affirmed on direct appeal on February 2, 1977. That same day in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), the Supreme Court of Nebraska for the first time held that the aggravating circumstances referred to in Nebraska's statutes must

be proved beyond a reasonable doubt. The standard under previous law, enunciated in *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955) had been that the factors upon which the jury determined whether the sentence was to be life imprisonment or death did not need to be found beyond a reasonable doubt. Following the decisions in *State v. Simants* and the direct appeal in *State v. Holtan*, Holtan filed a motion for re-hearing. The assignments of error included the following:

> "3. The interests of justice and due process require that the sentence in this case be vacated and remanded for resentence in conformity with the opinion of this Court that the aggravating circumstances must be found beyond a reasonable doubt."

The motion for rehearing was denied without opinion, apparently. Thus I cannot say that the issue now presented has been waived.

Holtan, CV 84-L-393, slip op. at 10-11.

The Nebraska Supreme Court did not rely upon a procedural bar in dealing with the claim presented here, but rather that court had every component of Rust's claim presented to it. The Nebraska Supreme Court recognized that it was dealing with a federal constitutional claim. Accordingly, I conclude that the Nebraska Supreme Court had a full and a fair opportunity to confront the Holtan issue and this court may, therefore, reach the merits of Rust's claim.

B. Rust was Denied Due Process

In the Supplemental Brief of Respondent, essentially three arguments are asserted by the State for the proposition that no uncorrected due process error took place in this case. Supplemental Brief of Respondent at 26-36. I shall summarize these arguments as follows. First, the Eighth Circuit's opinion in **Holtan** is not binding upon this court as precedent because the State conceded the error and did not appeal. **Id.** at 26. Second, there is no constitutional requirement that all aggravating circumstances must be proved beyond a reasonable doubt. **Id.** at 3436. Third, a state appellate court can correct error of constitutional magnitude occurring during sentencing without remand for resentencing. **Id.** at 30-33.

Before discussing the arguments advanced by the State it is necessary to state exactly Judge Urbom's ruling and the Eighth Circuit's ruling in **Holtan**. Judge Urbom made two rulings in favor of Holtan and otherwise ruled in favor of the State. Judge Urbom ruled on the issue which is significant in the case at bar as follows:

> The claim of the petitioner is that the aggravating factors found by the sentencing panel were not found by that panel under a beyond-a-reasonable-doubt standard and therefore the imposition of the death penalty was without due process of law.
>
> . . . .
>
> Holtan's conviction was affirmed on direct appeal on February 2, 1977. That same day in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), the Supreme Court of Nebraska for the

first time held that the aggravating circumstances referred to in Nebraska's statutes must be proved beyond a reasonable doubt. The standard under previous law, enunciated in *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955) had been that the factors upon which the jury determined whether the sentence was to be life imprisonment or death did not need to be found beyond a reasonable doubt. Following the decisions in *State v. Simants* and the direct appeal in *State v. Holtan*, Holtan filed a motion for rehearing. The assignments of error included the following:

> "3. The interests of justice and due process require that the sentence in this case be vacated and remanded for resentence in conformity with the opinion of this Court that the aggravating circumstances must be found beyond a reasonable doubt."

The motion for rehearing was denied without an opinion, apparently. Thus I cannot say that the issue now presented has been waived.

A careful review of the findings of the sentencing panel gives no impression that the panel interpreted the Nebraska statute to require a finding of any aggravating circumstance beyond a reasonable doubt. Neither that phrase nor any set of words reflecting the idea was used by the panel. Given that lack of expression and the fact that the first declaration by the Supreme Court of Nebraska that a beyond-a-reasonable-doubt standard applied to aggravating circumstances was after the sentencing of Holtan, the inference must be that the findings of the panel were not

based upon that standard, or if they were, nothing in the record supports a finding that they were.

In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) the two opinions by the justices constituting the majority expressed a standard that a state's responsibility is to give to the sentencer specific and detailed guidance in the fixing of death sentences. The plurality opinion said:

> "Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion. . . . ' It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' "

Justice Marshall stated in a concurring opinion:

> "In addition, I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute-words that are hopelessly ambiguous and

> could be understood to imply to any murder . . . – would effectively grant unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law."

Id. at 437 (Marshall, J., concurring).

> I think those statements are as applicable to a sentencing panel of judges as to a sentencing jury. Unless the reviewing court can be assured that the sentencer knew and applied the correct standard of law, it cannot be assured that the constitutional requirement of due process has been met.
>
> I conclude, therefore, that the petitioner's Claim 16 is well taken.

Holtan, CV 84-L-393, slip op. at 10-12.

Judge Urbom then ruled that aggravating circumstance "(d)," **Neb. Rev. Stat.** § 29-2523(1)(d) (Supp. 1974), – "especially heinous, atrocious or cruel" – of the Nebraska's death penalty statute as written, as construed by the Nebraska Supreme Court, and as applied, was unconstitutional. **Holtan**, CV 84-L-393, slip op. at 22-28. Judge Urbom also resolved other claims of **Holtan** in favor of the State.

The State appealed Judge Urbom's ruling on aggravating circumstance "(d)," but did not appeal Judge

Urbom's ruling on what I have characterized as the "**Holtan** issue." **Holtan**, 838 F.2d at 986. Holtan cross-appealed. **Id.** The Eighth Circuit vacated the portion of the district court opinion holding aggravating circumstance "(d)" unconstitutional because that issue was not ripe. **Id.** The Eighth Circuit stated: "As the State concedes, the sentencing panel's failure to ascertain whether the State had demonstrated aggravating circumstances beyond a reasonable doubt requires this case to be remanded." **Id.** Accordingly, the court "[a]ffirmed in part and reversed in part" and remanded the case. **Id.**

With regard to the State's first argument, I believe that this court is bound by the Eighth Circuit's opinion and order in **Holtan**. Obviously, the issue regarding the standard of proof to be applied by the sentencing panel was considered by Judge Urbom to be a federal constitutional issue. Equally clear is the fact that the Eighth Circuit considered that same issue as a federal constitutional issue because if it was merely a state law question, such an issue, as Chief Judge Lay recognized in **Holtan** on another matter, "is not justifiable in a federal habeas claim." **Id.** at 986 n.4. The Eighth Circuit "[a]ffirmed" Judge Urbom's opinion on the standard of proof issue. **Id.** at 986. Since the **Holtan** opinion was published it may be cited as precedent. Eighth Cir. R. App. P. 8(k); **id.** app. II (Plan for Publication of Opinions), Sec. 3; **id.** app. V (Internal Operating Procedures of the United States Court of Appeals for the Eighth Circuit), Sec. VI(B) (Publication of Opinions). Thus, whether or not the State appealed, the Eighth Circuit was confronted with, and ruled upon, the standard of proof issue, and the State had a full opportunity to comment thereon. In fact the State urged

the position adopted by the Eighth Circuit, as conceded by the State in this case. I emphasize that the Nebraska Supreme Court issued the **Holtan** and **Rust** opinions on the same day, and the Holtan opinion incorporates the **Rust** opinion therein for the purpose of addressing questions regarding constitutionality. **Holtan**, 197 Neb. at 545, 250 N.W.2d at 879. The issue in this case is identical to the issue addressed by Judge Urbom and addressed by the Eighth Circuit in **Holtan**. Therefore, this court is bound by the decision of the Eighth Circuit in **Holtan**.[9]

The second argument advanced by the State is that there is no constitutional requirement that aggravating circumstances found be proved beyond a reasonable

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[9] I note the admission of counsel for the State of Nebraska that the concession in **Holtan** was, at least in part, the result of sloppy work and that the State confessed constitutional error on the burden of proof issue in **Holtan** to avoid a ruling on the constitutionality of aggravating circumstance "(d)." These admissions raise a variety of troubling questions. Why should Rust die and Holtan live because one case suits the long-term litigation tactics of the State and the other does not? **See Code of Professional Responsibility DR** 7-103 (as adopted by the Nebraska Supreme Court); **id. EC** 7-13. As indicated previously, present counsel for the State did not participate in **Holtan** and present counsel for the State did not write the initial brief in this case. Present counsel for the State has acted candidly in this case. I have not had the benefit of input from counsel who appeared for the State in **Holtan** nor have I had the benefit of input from counsel for the State who wrote the initial brief in this case. Thus, I will not pursue the matter further, except to note that the credibility of the State's position was certainly not aided by the inconsistent positions taken by the State.

doubt. This argument misses the point, whether the predicate for the argument is true or not.[10] The issue in this

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[10] If the State's point is that the burden of proof is exclusively a state law issue, the State is mistaken. One of the issues with which the Supreme Court has been seriously concerned in death penalty cases is whether the entity which sentences must find statutorily specified aggravating circumstances beyond a reasonable doubt before imposition of the death penalty is permitted. For example, the Supreme Court in **Jurek v. Texas**, 428 U.S. 262, 265 n.l & 269 (1976) held constitutional a Texas statute which required the imposition of the death penalty if a jury answered certain aggravating circumstance questions in the affirmative, partly because the finding had to be based upon a reasonable doubt burden of proof standard. Likewise, the Georgia statute at issue in **Gregg v. Georgia**, 428 U.S. 153, 197 (1976) was found constitutional in part because the statute specified that at least one statutory aggravating circumstance must be proved beyond a reasonable doubt in order to impose the death penalty. **Gregg**, 428 U.S. at 165-66 n.9 (quoting **GA. CODE ANN.** § 27-2534.1 (Supp. 1975)). As Mr. Justice White has observed, the fact that the Georgia statute specified aggravating circumstances, one of which, according to the statute, had to be found beyond a reasonable doubt before a death sentence could be imposed, was one of "[t]wo aspects of that scheme [which] impressed [the Court] in particular as curing the constitutional defects in the system that was invalidated several years earlier in **Furnam v. Georgia**, 408 U.S. 238 (1972)." **Godfrey v. Georgia**, 446 U.S. 420, 445 (1980) (White, J., dissenting). The Nebraska Supreme Court recognized the federal constitutional significance of the burden of proof in **Simants** when, in response to the claim that the Nebraska death penalty statute was unconstitutional because the statute was silent on the burden of proof, that court stated:

> "'Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that

case was not whether in the abstract the Constitution requires aggravating circumstances be proved beyond a reasonable doubt. The due process issue, as pointed out by Judge Urbom, is, in part, whether the entity – be it a judge or jury – which first imposes the death penalty had sufficiently clear standards to limit what would otherwise be unbridled discretion to impose the death penalty. Unless the burden of proof is known and applied, the aggravating circumstance standard – which is the way a state may constitutionally differentiate between those who will receive the death penalty and those who will not – is meaningless. A process that allows a sentencer to pick the burden of proof that the sentencer wishes to employ when determining the existence of an aggravating circumstance is a process that fails to channel the sentencer's discretion by " 'clear and objective standards' " that provide " 'specific and detailed guidance' " which " 'make[s] rationally reviewable the process of imposing a sentence of death.' " **Godfrey,** 446 U.S. at 428. If the sentencer did not have such sufficiently clear instructions, then the process due the defendant has been denied. As Judge Urbom has fully explained this view, I shall not address it further.

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death is the appropriate punishment in a specific case.' "

We believe the obvious intent of the statute is that the enumerated aggravating circumstance should require strong proof.

Simants, 197 Neb. at 559, 250 N.W.2d at 888 (quoting **Woodson v. North Carolina,** 428 U.S. 280, 305 (1976)).

In any event, I understand Rust to argue that the process used in state court denied him due process, and not that he has a particular constitutional right in the beyond-a-reasonable-doubt standard per se.

Third, the State argues that a state appellate court can cure on appeal the type of error here, if any there be any, by resort to harmless-error analysis. The State cites no cases where a capital sentencing entity – be it judge or jury – was not instructed as to the proper standard of proof on aggravating circumstances, yet an appellate court was allowed to consider that error harmless through a **Chapman**-type analysis.

The State's argument, if accepted, would deprive a defendant subject to the death penalty of meaningful sentencing at the trial level and meaningful review before an appellate court. As indicated above, unless the trial-level sentencing entity is given direction as to what the legal standard of proof on aggravating circumstances is, the discretion of that body is not properly limited and a defendant is denied due process of law. If, then, an appellate court is the first court to apply the correct legal standard of proof to the issue of aggravating circumstances, e.g., by way of harmless-error analysis, the appellate court becomes the one and only body to facially properly apply the death sentence laws regarding aggravating circumstances.

A dominant aspect of death sentence statutes held constitutional by the Supreme Court is at least a two-tier process, whereby a **sentencer** is given specific directions on aggravating circumstances and an **appellate court** reviews the exercise of the **sentencer's** discretion and reweighs the evidence. **Proffitt v. Florida,** 428 U.S. 242, 252-53 (1976) (holding Florida statutes constitutional where the trial judge imposed the death sentence based upon specified statutory aggravating and mitigating factors after recommendations from an advisory jury and

where the Florida Supreme Court "reviewed and reweighed" the "evidence of the aggravating and mitigating circumstances" in order " 'to determine independently whether the imposition of the ultimate penalty is warranted' "). Indeed, as Mr. Justice White has said, these two aspects – sentencing at trial level pursuant to specific instructions and independent reweighing of evidence on appeal – are key to the Court's death sentence jurisprudence:

> In **Gregg v. Georgia,** 428 U.S. 153 (1976), we upheld the constitutionality of the capital-sentencing procedures in accordance with which the State of Georgia had sentenced petitioner to death. Two aspects of that scheme impressed us in particular as curing the constitutional defects in the system that was invalidated several years earlier in **Furman v. Georgia,** 408 U.S. 238 (1972). First, the sentencing system specifies statutory aggravating circumstances, one of which has to be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. Ga. Code §§ 26-3102, 27-2534.1 (1978). Second, the scheme provides for automatic appeal of all death sentences to the Georgia Supreme Court, which is required by statute to undertake a specific inquiry with respect to the soundness of the decision to impose the death penalty. § 27-2537.

Godfrey, 446 U.S. at 445-46 (White, J., dissenting, joined by Rehnquist, J.) (footnote omitted).

If the **sentencer** was not instructed at all, as in this case, as to the proper standard of proof on aggravating circumstances, an appellate court can determine only whether a rational **sentencer** might have imposed the

death penalty, but it is impossible for the **appellate court** to say whether the particular **sentencer** which sentenced the defendant would have so exercised its discretion if it had known the law. **Id.** at 437 (Marshall, J., concurring). By applying harmless-error analysis to the lack of instruction as to the proper standard of proof on aggravating circumstances, the Nebraska Supreme Court for all practical purposes did away with the two-tier sentencing structure so fundamental to holding death sentence statutes constitutional. **Id.** at 429 (Justice Stewart wrote for the three-judge plurality: "The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court"); **id.** at 437 (Marshall, J., concurring in the judgment, joined by Brennan, J.) (stating that the defect described by Justice Stewart "could not be cured by the **post hoc** narrowing construction of an appellate court").[11]

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[11] As will be discussed more fully later there are many troubling aspects to the use of "harmless-error" analysis in this case, and a few examples will serve to illustrate the point. Rust's lawyers were deprived of the opportunity to argue to the sentencing panel, without fear of contradiction in light of the existence of **Grandsinger,** that aggravating circumstances had not been proved beyond a reasonable doubt. Also, because of the way the issue arose in the Nebraska Supreme Court and the **post hoc** construction of the statute and the burden of proof on aggravating circumstances, counsel for Rust had no opportunity for oral argument or briefing before the Nebraska Supreme Court for the purpose of arguing that the evidence was insufficient regarding aggravating circumstances in light of the proper standard of proof. And, significantly, counsel had no opportunity to call, examine, or cross-examine witnesses with the

Sentencing which deprives a defendant of the **sentencer's** discretion violates the defendant's right to due process. For example, in **Hicks v. Oklahoma,** 447 U.S. 343 (1980), the Court held that a criminal defendant was denied due process of law when a state appellate court declared unconstitutional a provision of a state habitual offender law under which the defendant was sentenced, but the court did not remand for resentencing. **Hicks,** 447 U.S. at 347 & n.5. The appellate court declared that the defendant was not prejudiced because the sentence was within the range of punishment that could have been imposed by the jury had the jury been properly instructed. **Id.** at 345. The Court held that the defendant had a state-created liberty interest which could not be taken without due process of law. The liberty interest taken from the defendant in **Hicks** was the interest in having the jury exercise its discretion. **Id.** at 346. Similarly, in the case now before this court, the impact of the "harmless-error" analysis was to take from Rust his right to have the sentencing panel exercise its discretion upon application of the proper standard of proof.[12] The

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proper standard of proof in mind before the sentencing panel or the Nebraska Supreme Court.

[12] The State does not argue that the appellate court "resentenced" Rust in the sense that it gave him the same or equivalent state statutory rights he would have had in front of a sentencing panel, or that the Nebraska Supreme Court judges stated that they intended to weigh the evidence and impose the death penalty in lieu of the sentencing panel. The State cannot argue this point because the Nebraska Supreme Court did not state that it intended to "resentence" Rust, the state statutes did not give that authority to the Nebraska Supreme Court, and the Nebraska Supreme Court made none of the specific factual

Nebraska Supreme Court reviewed the facts found by the sentencing panel and then proceeded to determine that the lack of a standard of proof was error of the sentencing panel, but "harmless beyond a reasonable doubt."

Therefore, Rust was denied, without due process, his state statutory right to have the sentencing panel fix the sentence in the first instance based upon the proper standard of proof. **See Hicks,** 447 U.S. at 347. **See also Cabana,** 474 U.S. at 387 n.4; **Caldwell,** 472 U.S. at 330-31; **Presnell,** 439 U.S. at 16. As the Court stated in **Hicks,** a

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findings required by state statutes of a sentencing panel. **Neb. Rev. Stat.** § 29-2522 (Supp. 1973) (providing: "In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination."). But, even if the appellate court had purported to "resentence" Rust, it would appear quite likely that Rust would be entitled to, but did not receive, notice and a hearing, including the opportunity to present mitigating evidence, under state law, **see, e.g., Neb. Rev. Stat.** § 29-2521 (Supp. 1973) (providing: "In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence . . . and the defendant or his counsel shall be permitted to present argument . . . against sentence of death) and under federal constitutional law. **See Caldwell v. Mississippi,** 472 U.S. 320, 330-31 (1985); **Hicks,** 447 U.S. at 347 & n.5; **Presnell v. Georgia,** 439 U.S. 14, 16 (1978). Assuming that the Nebraska Supreme Court intended to "resentence" Rust, at the very least Rust would have had a right to a specific statement that the court intended to resentence Rust and thereafter an opportunity to brief and argue the matter. **See, e.g., Neb. Rev. Stat.** § 29-2521 (Supp. 1973). **See also Cabana v. Bullock,** 474 U.S. 376, 392 (1986). But I need not reach these questions because there is no contention that Rust was "resentenced" by the Nebraska Supreme Court.

case in which the state appellate court had simply assumed that the jury would have reached the same punishment decision if it had not been instructed on an unconstitutional penalty statute and affirmed the sentence, this type of an assumption denies criminal defendants like Rust due process: "The State concedes that the petitioner had a statutory right to have a jury fix his punishment in the first instance, and this is the right that was denied. . . . In doing so, the State deprived the petitioner of his liberty without due process of law." **Hicks,** 447 U.S. at 347.

Due to the importance of the two-tier process found constitutionally central to the act of imposing the death penalty described above, and the fact that Nebraska law gives the job in the first instance to the sentencing panel, this case is very similar to a situation in which a trial judge directs a verdict in a criminal case against the defendant. There the problem is not necessarily that the evidence is lacking; rather, the problem is that the defendant has a right to have the jury, not the judge, make the decision. In this case, the wrong entity – the Nebraska Supreme Court and not the sentencing panel – made the decision. Where the wrong entity makes the decision, harmless-error analysis has no place, as the Supreme Court stated in **Rose v. Clark,** 478 U.S. 570 (1986):

> Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that a "trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." **United**

> **States v. Martin Linen Supply Co.,** 430 U.S. 564, 572-73 (1977) (citations omitted). **Accord Carpenters v. United States,** 330 U.S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. **See Duncan v. Louisiana,** 391 U.S. 145 (1968). *Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.*

Rose, 478 U.S. at 578 (emphasis added).

Since state law defines the right to have the sentencing panel – not the Nebraska Supreme Court – impose the death sentence in the first instance[13] the Nebraska Supreme Court cannot usurp this function without impinging upon Rust's due process rights.

As a factual matter there is no argument available to the State that the sentencing panel knew what the correct standard was, but simply failed to articulate it properly, since the pertinent statute was silent, the only precedent on the subject was to the contrary – **Grandsinger** – and

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[13] There is no doubt that in the first instance the district court (meaning the district judge who presided at trial or a panel of three district judges appointed by the Chief Justice of the Nebraska Supreme Court) is the body entrusted with the decision to fix or not fix a death penalty. **Neb. Rev. Stat.** § 29-2520 (Supp. 1973) (discussed in **State v. Stewart,** 197 Neb. at 515-16, 250 N.W.2d at 861). And, clearly "the availability of appellate review, including reweighing of aggravating and mitigating circumstances, [does not] make the appellate process part of a single continuing sentencing proceeding." **Arizona v. Rumsey,** 467 U.S. 203, 210 (1984).

the Nebraska Supreme Court first announced the inapplicability of **Grandsinger** after the panel imposed the death sentence in this case. Accordingly, the silence in the record cannot be assumed to be a simple error of omission.[14]

In Rust's case whether the error is harmless depends upon, among other things, whether the sentencing panel would have concluded to "a moral certainty" that each particular aggravating circumstance existed. **See Nebraska Jury Instructions,** NJI 14.08 (1969) (defining "beyond a reasonable doubt") (discussed infra). Setting aside for a moment the impossibility of knowing what defense counsel would have done had he known the correct standard, the "moral certainty"/"beyond-a-reasonable-doubt" standard calls into question virtually every fragment of every significant individual experience that each particular sentencing panel member brought to the facts of Rust's case.

As pointed out above, under Nebraska law Rust had a state statutory right, which could not be taken from him consistent with due process considerations, to the exercise of the sentencing panelmembers' discretion. Since the exercise of that discretion is premised upon such subjective standard – the moral sensitivity of the sentencing

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[14] For the reasons expressed in section III(C) of these findings and recommendations, I find that the fact-finding procedures employed before the sentencing panel, and facts found, if any, before the Nebraska Supreme Court were not adequate for harmless error analysis. I incorporate section III(C) of these findings and recommendations herein. However, section III(B) of these findings and recommendations is not dependent upon section III(C).

panel members – none of these factors are "readily accessible to reviewing courts." **Delaware v. Van Arsdall,** 475 U.S. 673, 684 (1986). Indeed a "beyond-a-reasonable-doubt" instruction is so important in the trial of a criminal case on the merits that in **Jackson v. Virginia,** 443 U.S. 307 (1979), the Court stated: "Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." **Jackson,** 443 U.S. at 320 n.14; **see Rose,** 478 U.S. at 580 n.8. It is therefore inconceivable that the absence of such an instruction to a sentencing panel in a death penalty case could be cured by appellate review.

For the reasons stated above, this error could not be cured by resort to "harmless-error" analysis in the Nebraska Supreme Court, because to do so deprived Rust of his due process right to have the sentencing panel exercise its discretion according to an ascertainable standard and then to have that decision independently examined on appeal.

The State relies essentially on **Zant v. Stephens,** 462 U.S. 862 (1983) and **Barclay v. Florida,** 463 U.S. 939 (1983) for the proposition that harmless-error analysis is appropriate here. I disagree.

In **Stephens,** the Georgia Supreme Court had held that an aggravating circumstance set forth in the statute was unconstitutional because it was vague, but the instructional error was inconsequential. **Stephens,** 462 U.S. at 867 & n.5. The jury had found that three separate statutory aggravating circumstances existed, including the invalid one. The jury had been instructed on the invalid aggravating circumstance as well as on other

valid aggravating circumstances. **Id.** at 866. The underlying evidence presented on the invalid statutory aggravating circumstance – essentially the prior criminal record of the defendant – was admissible in any event as a non-statutory aggravating circumstance. **Id.** at 884-89. Therefore the Court concluded that the mere fact that one aggravating circumstance presented was improperly labeled "statutory" was inconsequential to the jury's deliberation, and it was not impermissible for the Georgia Supreme Court to so find. **Id.** at 862.

Stephens has no application to this case because the Supreme Court did not need to speculate about the impact of the error. In **Stephens** the jury needed to find only one aggravating circumstance in order to impose the death penalty, and the jury was not required to weigh evidence of aggravating or mitigating circumstances, unlike many other states such as Nebraska. Thus, there was no speculation about what the jury would have done in the weighing process had it been properly instructed. **Id.** at 873-74 & 873 n.12; **see Harper v. Grammer,** No. 87-2708, slip. op. at 11 (8th Cir. Feb. 5, 1990) (available on LEXIS, Genfed library, 8cir file). Second, the evidence received was fully admissible, and thus there was no need to speculate as to the impact on the jury of inadmissible evidence. **Id.** at 887. Third, the jury was authorized to consider the evidence in any event, so that there was no speculation that the jury considered an impermissible factor. **Id.** at 889-91. The error was only in the label attached to an instruction in **Stephens**, whereas here the panel had no instructions as to how to consider and weigh the evidence on aggravating circumstances.

In **Barclay v. Florida**, 463 U.S. 939 (1983), a Florida judge, whose duty it was to sentence, found various aggravating circumstances, one of which was a non-statutory aggravating circumstance, and the judge imposed a death sentence after an advisory jury had recommended a life sentence. The trial judge also found that no mitigating circumstances existed. **Barclay**, 463 U.S. at 944. The Florida Supreme Court found that the trial judge was not permitted to consider under Florida law a non-statutory aggravating circumstance, but that the error was harmless. **Id.** at 945. In Florida, as in Nebraska, the sentencer is to balance statutory aggravating circumstances against mitigating circumstances. **See id.** at 944.

One of the questions before the Court was whether the Florida Supreme Court's harmless-error analysis was appropriate. The Court decided that it was. **Id.** at 952-58. The Court found that if in Florida a sentencing judge found that some mitigating factors existed, the Florida Supreme Court would remand for sentencing where error had occurred regarding aggravating circumstances and would not apply harmless-error analysis. **Id.** at 955. If no mitigating factors were found by the trial judge, but there was error regarding aggravating circumstances, then the Florida Supreme Court would apply its harmless-error analysis. **Id.**[15] But even then the Florida Supreme Court's harmless-error doctrine was further limited in that, if the

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[15] If the trial judge applied the wrong standard in determining the presence or absence of mitigating circumstances, the Florida Supreme Court would vacate the death sentence and remand for resentencing. **Barclay**, 463 U.S. at 963 n.5 (Stevens, concurring) (citing **Ferguson v. State**, 417 So. 2d 631, 638 (Fla. 1982)).

advisory jury recommended a life sentence, then the trial judge was not permitted to sentence the defendant to death unless the facts clearly and convincingly established that virtually no reasonable person could differ that a death sentence was appropriate. **Id.**

The Supreme Court concluded that the Florida Supreme Court's use of harmless-error analysis was appropriate essentially for two reasons. First, consideration of the evidence in **Barclay** – once again like in **Stephens,** the defendant's criminal record – was not prohibited, even if the judge should not have considered the evidence for the purposes of finding a non-statutory aggravating circumstance. **Id.** at 956. In other words, the criminal record of the defendant could fairly be considered, for example, to rebut the existence of a mitigating factor, such as the absence of a criminal record. Second, the Supreme Court found in **Barclay** that there was no evident reason why the Florida Supreme Court could not apply **its** harmless-error doctrine when the trial court considered an improper aggravating circumstance. **Id.** at 958.

Barclay does not support the State's argument. First, if the harmless-error doctrine of the Florida Supreme Court was applied in **Rust,** resentencing, not harmless-error analysis, would be required. The harmless-error doctrine of the Florida Supreme Court required resentencing when a mitigating factor was found, and there was improper analysis of aggravating circumstances by the sentencer. **Id.** at 955. This is obviously the case because an appellate court cannot determine how the sentencer would have compared the remaining aggravating circumstances with the mitigating factors. Thus,

since the sentencing panel in **Rust** found a mitigating circumstance, the standards approved by the Supreme Court in **Barclay** would have required remand for resentencing if applied in **Rust**. As a consequence, if anything **Barclay** suggests that resentencing, not harmless-error analysis, is required.

Moreover, in **Barclay** the **sentencing** judge, who had received a recommendation for a life sentence from the advisory jury, was required to find that the death sentence was justified on facts "so clear and convincing that virtually no reasonable person could differ." **Id.** at 955-56 (quoting **Tedder v. State**, 322 So. 2d 908, 910 (Fla. 1975)). Thus, **Barclay** presented the converse of the situation here; that is, in **Barclay** the sentencing judge had applied what was essentially the beyond-the-reasonable-doubt burden of proof to various aggravating circumstances, whereas in this case the Nebraska Supreme Court first applied the standard to the facts. Therefore, the Supreme Court was not confronted with application of harmless-error principles to a situation where the sentencer was not instructed as to the burden of proof on aggravating circumstances.

In summary, this court is bound by the Eighth Circuit's decision in **Holtan**, 838 F.2d at 986, which decision on an issue identical to the one presented by Rust requires resentencing. Further, Rust was denied due process of law when the state sentencing panel was not given specific instructions on the burden of proof regarding aggravating circumstances. Finally, harmless error analysis cannot cure the due process violation which occurred before the sentencing panel because such analysis, among

other things, would deny Rust, without due process, his right to the exercise of the sentencing panel's discretion.

C. Error was not Harmless

The State argues that even if there was error of constitutional magnitude uncorrected in the state courts, this court can find through application of harmless-error principles that resentencing is not required. Supplemental Brief of Respondent at 36-40. Application of the harmless-error analysis denied Rust due process of law in the state courts, for among other reasons, Rust had a right to have his sentence fixed in the first instance by the state district court panel, and that right was denied him because the panel had no instructions as to the appropriate standard of proof regarding aggravating circumstances. Rust's due process right to the exercise or the sentencing panel's discretion cannot be cured by someone else – e.g., the Nebraska Supreme Court or this court – concluding that the evidence could have supported the panel reaching a particular conclusion had it known what the proper standard of proof was. Notwithstanding these conclusions, I shall also point out by way of two examples why the due process error cannot be considered harmless when the record, and the way it was developed, in the state courts is fairly read.

First, the fact-finding process in the state courts was not adequate to afford a full and fair hearing so that one can be certain that the error was harmless beyond a reasonable doubt as required by **Chapman**. **See** 28 U.S.C. § 2254(d)(2); **cf. Tyler v. Swenson**, 427 F.2d 412, 415 (8th Cir. 1970) (stating that state proceedings did not afford

the petitioner a full and fair hearing where the judge relied upon his own recollection of events).

Neither this court nor the Nebraska Supreme Court can know what the sentencing panel would have done if confronted with the correct standard of proof regarding the evidence on aggravating circumstances because the members of the sentencing panel were never confronted with the question, the record is silent on this point, and the panel members were never called as witnesses in any proceedings. If the **sentencer** was not instructed at all, as in this case, as to the proper standard of proof on aggravating circumstances, a reviewing court can determine only whether a rational **sentencer** might have imposed the death penalty, but it is impossible for the **reviewing court** to say whether the particular **sentencer** which sentenced the defendant would have so exercised its discretion if it had known the law. **Godfrey,** 446 U.S. at 437 (Marshall, J., concurring). Thus the opinion of the Nebraska Supreme Court has no value insofar as the record is concerned since nothing took place in the appellate court to supplement the factual record; that court essentially predicated its harmless-error analysis on the sentencing panel's silent record. **Rose**, 478 U.S. at 578. This court could do no better.

Even more significantly, Rust and his counsel had no ability to make a meaningful record for any court to review for harmless-error purposes. While **Rust** may not have been entitled as an abstract constitutional matter to the beyond-the-reasonable-doubt standard per se, Rust was on due process grounds **at least entitled to know what the applicable standard was, Godfrey**, 446 U.S. at 428, so that he could brief and argue the standard to the

panel and the Nebraska Supreme Court, and so that he could call, examine and cross-examine witnesses before the sentencing panel with the burden of proof in mind.

The importance of knowing the "standard of proof" in the context of developing a record for harmless-error analysis is borne out by the **Holtan** case. **Holtan,** like Rust, had been found to have been guilty of statutory aggravating circumstance "(b)" – the murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator – as provided for in **Neb. Rev. Stat.** § 29-2523(1)(b) (Supp. 1974). But on remand from the United States Court of Appeals for the Eighth Circuit, the sentencing panel in **Holtan** concluded that the failure to previously find that aggravating circumstance "(b)" had existed beyond a reasonable doubt was material to the second panel's decision, and, after reviewing the evidence, concluded that aggravating circumstance "(b)" had **not** been established beyond a reasonable doubt, **despite the Nebraska Supreme's Court's holding to the contrary**:[16]

> (b) *The murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator.* Sec. 29-2523(1)(b).
>
> The evidence adduced shows that on November 1, 1974, Lawrence Loder; Linda

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[16] Ironically, the Nebraska Supreme Court opinion in **Holtan** relied upon **Rust,** in general, for constitutional analysis. **Holtan,** 197 Neb. at 545, 250 N.W.2d at 879.

Ulshafer, a friend of Loder; and Pete Christensen, a patron, were in the Dugout Bar in Omaha, Nebraska.

Shortly before midnight, the defendant entered the bar carrying a derringer pistol which he pointed at the three persons in the bar. Ms. Ulshafer and Mr. Christensen were forced into the bar's restroom. At that time the robbery occurred. Ms. Ulshafer indicated that it was her belief that no one recognized Holtan.

The defendant forced the deceased victim, Lawrence Loder, into the restroom at gunpoint and ordered that he tie the hands of the two other persons with bar towels and Mr. Loder had the other two persons kneel on the floor. Mr. Loder then began to walk back towards the defendant, and then Mr. Loder said, "Oh, my God, no." Ms. Ulshafer testified that at that point, "I looked up and Holtan was pointing the gun at my head; and Larry turned towards me and he shot Larry and, I saw Larry just fall back and I shut my eyes and I was shot."

The defendant fired four shots; two of the bullets entered the deceased victim, Lawrence Loder; one bullet entered the back of Linda Ulshafer, seriously wounding her; the fourth bullet did not strike anyone including Mr. Christensen. Ms. Ulshafer further testified at the original hearing "Holtan stood at the door for a while, and then he backed out."

The original panel found that the murder of Lawrence Loder was committed by the defendant to conceal the commission of the crime and to conceal the identity of the defendant. The Nebraska Supreme Court in affirming the trial court's finding of this aggravating circumstance

> *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), stated, "(o)bviously no other reason for the wanton killing was present," and did not comment further.
>
> The fact that the defendant shot and killed Lawrence Loder is evidence of the defendant's intent to conceal his own identity. But Holtan's shooting of Linda Ulshafer in a portion of her body in which death might or might not have resulted, and his failure to shoot the remaining witness is evidence contradicting the assertion that the murder was committed in an effort to conceal the identity of the perpetrator of the crime.
>
> The original panel did not make the finding of this aggravating circumstance beyond a reasonable doubt and when that standard is applied, the current panel finds and concludes that this aggravating circumstance is not found to exist beyond a reasonable doubt.

(Filing 54 (**State v. Holtan,** Doc. 092, No. 634 (District Court of Douglas County, Neb., Oct. 17, 1989) (Order of Resentence)), pages 7-8).

Counsel for Rust simply could not make an adequate record for harmless-error review without knowing what the proper standard of proof was. Questions about whether aggravating circumstances were to be proved by a particular standard would obviously influence defense counsel's view as to the presentation of the defense at sentencing; for example, whether to call Rust as a witness in the sentencing proceeding or call other witnesses might well have turned on burden of proof considerations. In this case, as will be pointed out below in

another context, the question of whether the victim Kellogg or the defendant Rust was the aggressor were vitally important to consideration of aggravating circumstance "(b)" as well as at least two other aggravating circumstances. Rust had been found guilty of the felony murder of Kellogg[17], but that jury finding did not establish the existence of aggravating circumstance "(b)" or any other aggravating circumstance.

With Kellogg dead, Rust was apparently[18] the only witness to observe the entirety of the shooting incident between Rust and Kellogg. As will be pointed out below, a police officer observed part of the shooting incident but not all of it. The evidence indicated that the victim was a "volunteer" private citizen who armed himself and, without a request from the police, pursued Rust and fired at least two shots at Rust as Rust tried to jump a fence. The only evidence of the shooting incident that the sentencing panel had to rely upon was the trial transcript testimony of one police officer who witnessed only part of the incident. Rust did not testify at the sentencing hearing.

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[17] The victim's name is spelled in various ways in the record. I have used the apparently correct spelling in the text-"Kellogg." I have left the name spelled as is in any quotation from the record.

[18] I say "apparently" because at a later postconviction proceeding Rust's codefendant testified that he did the shooting, not Rust. **State v. Rust**, 208 Neb. at 322, 303 N.W.2d at 492-93. This codefendant, who received a life sentence, was not called as a witness in Rust's sentencing proceeding. At the time of Rust's sentencing the codefendant was awaiting retrial on certain counts of the indictment for which the trial jury had hung as to the codefendant. (Exh. 4 (Bill of Exceptions), 129:20-130:2).

The police officer who testified at trial was not recalled as a witness during the sentencing proceeding.

Defense counsel's closing argument to the sentencing panel on this issue illustrates how critical his lack of knowledge as to the standard of proof was to the development of a fair record upon which to predicate harmless-error analysis:

> Mr. Pane talks a great deal about Mr. Kellog. We don't have John Rust going into somebody's house and cold-bloodedly killing them; and cold-bloodedly raping them.
>
> Mr. Kellog introduced himself into the situation.
>
> And, Mr. Pane also indicated that – at no request from anyone, I believe that's correct.
>
> He came around the corner with his gun-blazing, as one of the Officers had indicated.
>
> A trained Officer was standing behind him around the corner.
>
> So, we got Mr. Rust standing in the back yard with somebody shooting at him.
>
> Kill or be killed, I suppose.
>
> *However, I don't think that all is relevant to day [sic].*

(Exh. 4 (Bill of Exceptions [hereinafter BOE]), 130:24-131:19 (emphasis added)).

Instead of arguing that the facts about how Kellogg was killed were not "relevant today," had defense counsel known of the "beyond-the-reasonable-doubt" standard the record in this case would quite likely have been very different.

This case is much like **Holloway v. Arkansas**, 435 U.S. 475 (1978) in which the Supreme Court ruled that harmless-error analysis should not be applied to an ineffective assistance of counsel claim, where trial counsel represented three defendants with conflicting interests during trial of a case, even though the record might not demonstrate actual prejudice. In part, the Supreme Court reasoned that harmless-error analysis should be limited to cases where the "error occurs at trial and its scope is readily identifiable" such that the "reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." **Id.** at 490. But as the Court stated, where the issue revolves around the advocate who "finds himself compelled to **refrain** from doing" some act, "an inquiry into a claim of harmless error . . . would require, unlike most cases, unguided speculation." **Id.** at 490-91.

It is simply impossible to judge the silent record here as to what Rust's counsel might have done had he known the correct burden of proof on aggravating circumstances. In a very real sense, counsel was "compelled to **refrain**" from even addressing the issue before the sentencing

panel.[19] This is a situation where evaluation of the error requires inquiry about evidence that might have been, but was not, placed in evidence; however, such analysis is precluded because one cannot know how counsel would have exercised his judgment to present the issue. This inherent difficulty in evaluating the record makes harmless-error analysis inappropriate. **See id.; Rose,** 478 U.S. at 579 n.7. I, therefore, must conclude that the method for the development of the facts of this case was so flawed that application of harmless error principles to the record would be nothing more than "unguided speculation." See **Holloway,** 435 U.S. at 491.

The State relies principally on **Rose** and **Delaware v. Van Arsdall,** 475 U.S. 673 (1986) for the proposition that this type of error is suitable for harmless-error analysis. I disagree.

In **Rose,** the Court was confronted with an instruction on "malice" which improperly shifted the burden of proof by presuming malice. The Court held that such an error was properly subject to harmless-error analysis because, among other things, the error did not impact the composition of the record, **Rose,** 478 U.S. at 579 n.7, and because the jury had been instructed that it must find guilt beyond a reasonable doubt in any event, **id.** at 580. For the reasons pointed out above, I believe that the error here significantly impaired the preparation of the record in this case. Thus, I do not think that **Rose** is helpful.

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[19] Also, defense counsel would have had an extremely difficult time negotiating any plea agreement without knowing what the State's burden of proof was at sentencing. This kind of prejudice obviously cannot be discerned from the record.

Still further, the Court explicitly noted that the instruction error in **Rose** was not the equivalent of a directed verdict because the jury still had to find the defendant guilty beyond a reasonable doubt, and the Court contrasted other situations by citing **Jackson v. Virginia**, 443 U.S. 307, 320 n.14 (1979), for the suggestion "that failure to instruct a jury as to the reasonable doubt-standard cannot be harmless". **Rose,** 478 U.S. at 580 n.8. In **Jackson**, the Court stated: "Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." **Jackson,** 443 U.S. at 320 n.14.

In **Rose,** the Court thus clearly distinguished between two situations. Where a jury is given a reasonable doubt instruction, but otherwise is improperly instructed, harmless-error analysis can normally be applied. In contrast, where a jury is not given a reasonable doubt instruction harmless-error analysis cannot be applied. The difference between these two situations is that the jury's discretion is constitutionally circumscribed when the beyond-the-reasonable-doubt instruction is given, and thus one is able to determine whether the additional improper instruction was superfluous to the jury's consideration. **Id.** at 581. When the reasonable doubt instruction is not given, the jury is left to do as it pleases, and one cannot ever know whether the absence of the reasonable doubt instruction was superfluous or not.

This latter instance is what is presented in Rust's situation. The sentencing panel's discretion was not circumscribed by any instructions as to the burden of proof, and thus one cannot know what the sentencing panel

would have done had it known the law. Therefore, **Rose** is not applicable.

The State further relies upon **Van Arsdall**. In that case defense counsel was improperly denied the right to cross-examine. a prosecution witness when the trial court refused to allow the witness to be questioned about an agreement to dismiss charges against the witness in exchange for the testimony. **Van Arsdall**, 475 U.S. at 676-77. Without requiring a showing of outcome-determinative prejudice, the Court believed that a violation of the confrontation clause had been shown. **Id.** at 680. Despite the violation, the Court concluded that harmless-error analysis was appropriate because, in confrontation clause matters, "[w]hether such an error is harmless in a particular case depends upon a host of factors, **all readily accessible to reviewing courts.**" **Van Arsdall**, 475 U.S. at 684 (emphasis added).

In Rust's case whether the error is harmless depends upon, among other things, whether the sentencing panel would have concluded to "a moral certainty" that each particular aggravating circumstance existed. **See Nebraska Jury Instructions**, NJI 14.08 (discussed **infra**). Setting aside for a moment the impossibility of knowing what defense counsel would have done had he known the correct standard, the "moral certainty"/"beyond a reasonable doubt" standard calls into question virtually every fragment of every significant individual experience that each particular sentencing panel member brought to the facts of Rust's case. As pointed out above, under Nebraska law, Rust had a state statutory right, which could not be taken from him consistent with due process,

to the exercise of the sentencing panel members' discretion. Since the exercise of that discretion is premised upon such a subjective standard – the moral sensitivity of the sentencing panel members – none of the factors "are readily accessible to reviewing courts." **Van Arsdall**, 475 U.S. at 684. Thus, I do not find **Van Arsdall** applicable.

Second, assuming for the moment that the record is adequate to support harmless-error analysis, I disagree that the record establishes that, to quote the State's brief, "the sentencing panel would have found the **same** aggravating circumstances had they applied the beyond a reasonable doubt standard." Supplemental Brief of Respondent at 39 (emphasis added). I shall concentrate on aggravating circumstance "(b)" to illustrate the point. The sentencing panel found as to aggravating circumstance "(b)":

> (b)
>
> "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime";
>
> The evidence conclusively establishes that at the time of the murder of Michael Kellog, the defendant was attempting to escape capture after participating in an armed robbery of a supermarket at 30th and Weber in Omaha, Nebraska, and after having engaged in a running gun battle with officers of the Omaha Police Department during which time he fired numerous shots at Police Officers George E. Allen and Joseph Nepodal. Following the murder of Michael Kellog, the defendant shot and

> wounded Police Officer Russell Wolf. Concurrently with his trial for murder, he was convicted of three counts of shooting with intent to kill, wound or maim the three police officers. The court finds that the murder of Michael Kellog was committed by the defendant to conceal the commission of these crimes and to conceal the identity of this defendant.

This aggravating circumstance does exist. (Exh. 5 (Order of Sentence), page 4).

However, as the Nebraska Supreme Court found, the panel erred by finding that the murder was committed to conceal the commission of other crimes:

> However, we think that the panel was wrong in finding that the murder was committed to conceal the commission of another crime. The murder could not have concealed the commission of the crime or of the assaults because it did not destroy or was not an attempt to destroy evidence of those crimes. Their discovery could not have possibly been prevented by the murder of Kellogg. The other crimes were, in fact, already known. We hold that a murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed as, for example, in a case where murder by arson is committed in an effort to conceal the evidence of commission of another crime, e.g., another murder or burglary, or where the murder of a witness is likely to prevent the discovery of a prior crime not otherwise likely to be discovered.

Rust, 197 Neb. at 537, 250 N.W.2d at 873.

Thus, the remaining component of aggravating circumstance "(b)" is whether the "murder of Michael Kellog was committed by the defendant . . . to conceal the identity of" Rust. (Exh. 5 (Order of Sentence), page 4). The Nebraska Supreme Court ruled on this issue in three sentences:

> In this case the panel found that aggravating circumstance (b) did exist, that is, "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." [**Neb. Rev. Stat.**] § 29-2523, R.R.S. 1943. In the case before us the robbers were masked, they were apparent strangers in the neighborhood, and the murder was part of the attempt to escape and so part of the effort to conceal their identity. The finding of the panel on circumstance (b) was correct.

Id. at 536-37, 250 N.W.2d at 873.

The facts, as summarized by the Nebraska Supreme Court to support its conclusion that this portion of aggravating circumstance "(b)" and other aggravating circumstances were proved beyond a reasonable doubt, are these:

> On February 21, 1975, the defendant and two companions, Ronald Raymond Ell and Donald D. Fread, robbed at gunpoint employees of the Hinky Dinky store at 30th and Weber Streets in Omaha, Nebraska. The robbers fled in an automobile. Almost immediately police were alerted and a chase ensued, during which Rust was observed firing at the police cruisers. Two cruisers were struck by the bullets. The cruiser driven by officer Allen was hit by two bullets

which passed through the front windshield. Another cruiser driven by officer Nepodal was hit by a bullet which passed through the left rear quarter panel and backseat, and lodged in the right rear door. During the chase the robbers' car became trapped on a residential street when police vehicles blocked both forward progress and retreat.

At that time the robbers' car became stuck in a snowbank. Fread, who was the driver of the get-away car, was shot and killed by the police near the point where the car stopped. Rust and Ell left the car on foot. Police officers Wolf, Allen, and Nepodal, who were the victims named in counts 2, 3, and 4, and others pursued them. Rust continued the fire fight and shot Kellogg, a civilian who had come to the aid of the police. Officer Wolf was severely wounded by Rust. Officer Allen suffered a slight wound. The evidence showed that Ell hid in some bushes adjacent to a residence and surrendered when ordered to do so. Rust took refuge in a backyard and continued to fire at the officers until he was himself wounded. The evidence, both eyewitness and ballistic, showed that Kellogg was killed by Rust and that the bullet which came from his gun was the one that lodged in the police cruiser driven by Nepodal. Kellogg was shot by Rust four times and he was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust.

Id. at 532-33, 250 N.W.2d at 871.

During the trial of the case, officer Wolf testified on direct examination that he first saw Kellogg on a sidewalk, and the man later identified as Rust was running toward a fence. Kellogg shouted to the man to stop, and then Kellogg fired "shots" at the man. The man appeared to slump as if [sic] had been shot. The man was then chased by Kellogg. The officer followed Kellogg. Kellogg fired another shot at the man. The officer heard an exchange of gun fire and for at least a moment could not see Kellogg and the man. Then the officer proceeded around the house and saw Kellogg slumped over. The officer saw a party in a blue parka with a gun, and the man fired "probably" one or two more shots at Kellogg as he went down. As the officer stepped around the corner, the officer tried to shoot the man with his shotgun; the shotgun did not fire, however, and the man turned around and shot the officer. The verbatim testimony was this:

Q. And, now where was the party that was trying to – attempting to go over the fence at the rear of 2519 Sharon Drive?

A. Where was he?

Q. Yes.

A. Well, he was heading southbound in that backyard.

Q. How could you see him?

A. Between the houses.

Q. Now which houses are you referring to?

A. Well, it would be the east side of the yellow house, between the house to the east of that, and the yellow house.

Q. Now, right to your left there, there is a map, get up and look at that. Orient yourself with that. Are you oriented?

A. Yes.

Q. Now, is that –

THE COURT: Turn your back to me so that all of the Jury can see.

MR. PANE: Your Honor, may I approach the witness?

THE COURT: Yes, you may.

A. (Indicating) I pulled up and stopped right here, in front of the – about right here, in front of the driveway.

Q. All right. Now, would you mark that and put your initials there? Put an outline of – like an automobile or a square showing –

A. Just a square?

Q. Yes. All right. Now, when you were – now, when you were there, what did you observe?

A. Well, Michael was standing right here. On the sidewalk here. And he hollered at me.

Q. Now would you put M-K-there? Where you first saw Michael? All right. Now, after he hollered at you, you said you saw someone in the back of 2519?

A. Right.

Q. And, where was that party when you saw him?

A. Well, he was heading southbound. He was approximately right here. By the time he

was at an angle where I could see, he was right here.

Q. All right. Now, how far did that party get?

A. To the fence.

Q. All right. Will you mark – put an X there. Now, when you saw that party in that position at the fence, what happened then?

A. Well, Michael shouted to the party to stop. He turned around. He walked around ten or fifteen steps towards this direction right here, and he hollered at the party to stop. At that time he took shots at the party.

Q. What did you observe then?

A. I observed the party here slump at the fence, as if he got shot.

And, then, he turned around looked at me and Michael, and ran this direction back towards the house.

Q. All right. He ran then in what direction would that be?

A. North.

Q. Did you see him then, after he ran back towards the house?

A. No.

Q. What did you do then Officer?

A. Well, Michael, as soon as the party turned around and ran this way, –

Q. Now, when you say 'this way' are you referring to –

A. No. As soon as he ran north to the house he disappeared out of sight, he was between the houses, Mike started to run towards – between the houses south. At that time, I got out of the Cruiser and got my shotgun; and I pumped a round and ran behind Mike, about twenty or thirty steps. I don't know.

Q. Were you running though?

A. At a slow trot, yes.

Q. Slow trot?

A. Yes.

Q. Okay. Now, as you started going south on the street, where did you go?

A. I followed Mike. And, Mike ran between the houses; he turned right, which would be here.

Q. All right. At that time, where are you?

A. I was about right here.

Q. Now, are you close to the house?

A. Yes.

Q. Which is known as 2519?

A. Yes.

Q. All right.

A. Very close.

Q. All right. Then, what happened?

A. Okay. Then Mike ran at a southwesterly direction, this way.

Q. Now, at that time, where are you?

A. Oh, I was almost up the corner of the house, just about, three-fourths of the way.

Q. All right.

A. At that time, I saw Mike turn to his right and face a northwesterly direction, and hold his gun up, aim, and fired a round, at that direction. Continued to run sideways, as if he was looking over here; at that time, I heard several shots. And, probably half a dozen, maybe four or five. And, I saw him slump, start to fall.

Q. All right. Now, where are you at that time?

A. At the corner of the house.

Q. Now, you are at the corner of the house?

A. Yes.

Q. Now, do you have a view of that backyard?

A. Yes.

Q. All right. Now, can you see – how much could you see in the backyard?

A. Well, it would be an angle, you know, coming out this way, about half Three-fourths of the backyard.

Q. Did you see anyone else in the backyard besides Michael Kellog?

A. At the time Michael started to fall, I stepped around the corner.

Q. All right.

A. I saw a party in a blue parka with a gun firing probably one or two more shots at Michael as he went down.

Q. As he was down?

A. Yes, sir.

Q. All right.

A. And, I stepped around, as I said, I had stepped around, saw the party, I aimed a shotgun at him, I pulled the trigger and the shotgun did not work. And, the party turned around and saw me, and he spun around and shot me.

(Exh. 3(a) (BOE), 228:2-233:20).

On direct examination the officer said that he had a good look at the gunman (Exh. 3(a) (BOE), 234:10-11) and that he was able to positively identify the gunman (Exh. 3(a) (BOE), 236:10-24). On cross-examination the officer said that he was able to view the gunman's face and determine that he was not wearing glasses and that he had long hair and a light beard. (Exh. 3(a) (BOE), 275:1220).

On cross-examination by counsel for the codefendant, the officer testified that when he arrived at the scene Kellogg was on the street side of some houses that did not belong to Kellogg, and Kellogg informed the officer that the man had run behind a house belonging to persons other than Kellogg. Kellogg told the officer to bring the officer's shotgun. Kellogg was not asked by the officer to do anything and particularly was not asked to assist the officer. Kellogg on his own fired two shots at the fleeing man and chased the fleeing man. Prior to the

time that Kellogg ran after the man, the officer did not observe anyone shooting at Kellogg as the man ran from Sharon Drive. The cross-examination reads as follows:

BY MR. JABENIS:

Q. Officer Wolf, when you first arrived on Sharon Drive, Michael Kellog was out in front of 2519, between 2519 and 2515, is that correct?

A. Twenty-five Thirteen, – Twenty-five Fifteen, I believe. Yes, Twenty-five Fifteen.

Q. And, when you first drove up, did you get out of your car?

A. No. I opened up the door.

Q. At that time, however, Michael Kellog informed you that the parties were behind the home located at 2519?

A. Correct.

Q. All right. At that time, did you get out of your car?

A. No, I opened up the door at that time.

Q. At that time, Michael Kellog told you that you should bring your shotgun, is that correct?

A. Yes.

Q. Now, if you know where, just yes or no, does Michael Kellog live at 2523?

A. No.

Q. Does Michael Kellog live at 2519?

A. No.

Q. Does Michael Kellog live at 2515?

A. I'm sure he does yes. It's the blue house up there.

Q. Now, –

MR. JABENIS: May I have a moment, your Honor.

THE COURT: Yes, you may.

(WHEREUPON, a discussion was had between the respective Counsel, in an undertone, out of the hearing of those present, and not reported by the Court Reporter.)

MR. JABENIS: At this time, your Honor, I would enter a stipulation, that Michael Kellog does not in fact live at 2515 and lives at 2509 Sharon Drive.

MR. PANE: Now, the State will agree that's where he lives.

We stipulate.

Q. Again, asking you the question, based upon the State's stipulation, which you heard; Michael Kellog does not live at any of these three homes, which are shown on this?

A. No.

Q. Now, Officer Wolf, to your knowledge, was Michael Kellog employed by or a member of the Omaha Police Department?

A. Not that I know of, no.

Q. To your knowledge, on February the 21st, 1975, was Michael Kellog ever deputized?

A. I wouldn't know.

Q. In other words, he didn't work on the Omaha Police Force?

A. Not that I know of.

Q. Now, Michael Kellog fired two shots at the party that was attempting to climb over the fence behind 2519 and 2515, is that correct?

A. Yes.

Q. Did you order him to fire those shots?

A. No.

Q. Now, you were still in your car at the time Michael Kellog fired those shots, is that correct?

A. Yes, I had the door open.

Q. And, immediately after Michael Kellog fired those shots, did he commence running towards the party at whom he fired the shots?

A. Right.

Q. Did you order him to run towards that party?

A. No.

Q. And, it was at that time that you took your shotgun and got out of the car, is that correct?

A. That's correct.

Q. You followed Michael Kellog?

A. Right.

Q. Prior to the time that Michael Kellog ran between the two houses, and then ran

behind the home located at 2519 Sharon Drive, did you observe any party shooting at Michael Kellog, out on Sharon Street?

A. Out on Sharon Street?

Q. Out on Sharon Drive?

A. No.

Q. As a matter of fact, there were no parties out on Sharon Drive, is that correct?

A. Right.

(Exh. 3(a) (BOE), 265:20-269:113).

On further cross-examination the officer said that Kellogg told him that the "suspects," referring to "two parties," were in the backyard. The officer further made clear that he did not see the entire exchange of gunfire because he was behind Kellogg and around the corner of one of the houses. The testimony was as follows:

Q. And, what did you do when you first stopped your Cruiser in front of 2519 Sharon Drive?

A. What did I do?

Q. Yes.

A. Well, Michael told me the suspects were in the back of the yellow house.

Q. Well, what affirmative actions, if any, did you take at that time?

A. As soon as he told me that, I grabbed the microphone in the Cruiser. I was attempting to announce on the air which house the two parties were behind.

Q. Did you notice what he did at that point in time?

A. Yes, that's when I heard him holler stop.

Q. And, do you recall, whether or not if he started running towards the back of the house at that point in time?

A. No, he shot first.

Q. And, then did you start running?

A. Yes.

Q. At what point in time then, did you get out of your Cruiser?

A. Well, I had the door open then. You see everything happened kind of at the same time, I opened the Cruiser door and grabbed the mike; I began to radio in. The Omaha Police have a Three-beep signal for 'Help an Officer' exchanger, and that cut me out.

Q. Now, at that point in time, your Cruiser was facing west?

A. Right.

Q. On Sharon Drive? Is that correct?

A. Yes.

Q. And, do you recall whether or not you looked west on Sharon Drive, at that point in time?

A. I can't remember.

Q. You don't recall whether you did?

A. No.

Q. So, it's possible there were other Police Officers on Sharon Drive and Minne Lusa Avenue, is that correct?

A. Yes, it would be possible.

Q. And, then you ran towards the back of 2519 Sharon Drive, is that correct?

A. Right.

Q. Did you stop at any time?

A. No.

Q. Did you stop by the east side of 2519 Sharon Drive, before you proceeded into the backyard?

A. I might have hesitated.

Q. And, could you see from your vantage point on the east side of 2519 Sharon Drive, the entire backyard of 2519?

A. Before I came around the corner?

Q. Yes.

A. About three-fourths of it.

Q. Did you see any other parties other than Mr. Kellog in that backyard, at that time?

A. At that time?

Q. Yes.

A. No.

Q. At what point in time did Michael Kellog start falling to the yard?

A. What time?

Q. Yes, what point in time – are you still on the east side of 2519?

A. Right.

Q. Did you actually see anybody shoot him?

A. Yes.

Q. At that point, when he first started to fall?

A. Right at that point?

Q. Yes.

A. No.

Q. And, how long would you estimate it was after you went around the back of 2519 before you were shot?

A. A few seconds.

Q. Just a second, did you say?

A. Yes.

Q. And, did you say anything to anyone when you went around the corner?

A. No.

Q. You did not have a chance to observe any other parties in the area then, did you?

A. After I went around the corner?

Q. Yes.

A. I observed Michael Kellog and the suspect in the blue parka.

(Exh. 3(a) (BOE), 271:21-275:11).

Further redirect and recross-examination established that the officer did not see the first shot or shots that

struck Kellogg, and that Kellogg fired at least one more shot at the fleeing man about the time that Kellogg ran around the corner of the house and was shot. The testimony read as follows:

REDIRECT EXAMINATION

BY MR. PANE:

Q. Officer Wolf, you were asked when you started to see Michael Kellog fall, did you see anyone shoot him? And, you answered, No?

A. Right. When he started to fall, no I didn't. i was just running around the corner.

Q. All right. Did you come around the corner then?

A. Yes.

Q. Did you see anyone shoot him after that?

A. Right.

Q. And, how far away were you; what was the distance between the man that was shooting Kellog?

A. Between – distance between what?

Q. The man that was shooting Mr. Kellog - had shot Mr. Kellog?

A. Between him and Kellog?

Q. Yes.

A. Thirty feet.

Q. Thirty feet. This is the man, the man that was shooting Kellog and the man that you identified in Court?

A. Yes.

MR. PANE: That's all.

MR. JABENIS: No further cross.

MR. BREIT: I have one further question.

RECROSS EXAMINATION

BY MR. BREIT:

Q. How many shots did you hear fired, if you recall?

A. Several. At least a half dozen.

Q. At least six shots were fired?

A. Yes, Michael had fired one, also.

Q. Now, was this prior to your going around the corner into the backyard at 2519 Sharon Drive?

A. Yes. During.

Q. During the time you went around?

A. Yes.

Q. Approximately, six shots were fired?

A. Yes.

(Exh. 3(a) (BOE), 279:2-280:22).

In Nebraska, at the time of the consideration of the sentencing issue in this case, the common pattern jury instruction used in the state courts defined "reasonable doubt" as follows:

NJI 14.08

REASONABLE DOUBT

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Nebraska Jury Instructions, NJI 14.08 (1969), **cited in State v. Rust,** 197 Neb. at 543, 250 N.W.2d at 876.

I cannot conclude, applying the "abiding conviction, to a moral certainty" definition of "reasonable doubt" found in NJI 14.08, that a sentencing panel would have concluded that the facts established "beyond a reasonable doubt" that "[t]he murder was committed in an apparent effort . . . to conceal the identity of the perpetrator." **Neb.**

Rev. Stat. § 29-2523(1)(b) (Supp. 1974). No fair reading of the record would support a conclusion "beyond a reasonable doubt" that the defendant killed in order to hide his identity from Kellogg or anyone else.

Respectfully, the record summarized by the Nebraska Supreme Court and the sentencing panel does not reflect the proper skepticism required by the "beyond-a-reasonable-doubt" standard. A few examples will serve to illustrate the point.

The record is **undisputed** that as Rust ran away from Sharon Street the exchange of gunfire between the police and the robbers had ceased, and Rust was not shooting at Kellogg. The record is **undisputed** that Kellogg, not Rust, started shooting at Rust when Rust was running away from Kellogg after Kellogg had yelled at Rust to stop. The record is **undisputed** that Kellogg fired at least two shots, and perhaps as many as three shots, at Rust before Rust returned the fire. The record is **undisputed** that Kellogg was a private citizen who was not asked to aid the police in any way. Moreover there is no evidence that the police needed or wanted any aid. Thus, it is not a fair characterization of the evidence to state, as the Nebraska Supreme Court stated, that "Rust continued the fire fight and shot Kellogg, a civilian who had come to the aid of the police." **Rust,** 197 Neb. at 532-33, 250 N.W.2d at 871. Rust did not "continue" the "firefight"; Kellogg did. Kellogg did not come to the "aid of the police," at least not at their request.

The record is **undisputed** that Wolf was able to positively identify Rust. The record is **undisputed** that officer Wolf was able to see Rust's face and to see that he did

not wear glasses and that he had long hair and a slight beard. Therefore, the most reasonable conclusion is that Rust was not wearing a mask when he shot Kellogg. Indeed, the State in closing argument in the trial of the case on the merits contended that the codefendant had the two masks introduced in evidence on his possession when apprehended. (Exh. 3(b) (also identified as Exh. 22) (BOE), 526:22-527:7). Thus, it is a seemingly irrelevant characterization of the evidence to state then, as the Nebraska Supreme Court stated, that "the robbers were masked" in connection with the court's discussion of aggravating circumstance "(b)." **Rust,** 197 Neb. at 536, 250 N.W.2d at 873. Even if the robbers were masked earlier, Rust was not masked at the time of the shooting. As a consequence, it is difficult to conclude that Rust was concerned about his identity.

While it may seem clear that Rust shot Kellogg, it is not at all clear that, as the Nebraska Supreme Court stated, Rust "was observed to be shooting into Kellogg's body **after** Kellogg had fallen as a result of an earlier shot fired by Rust." **Id.** at 533, 250 N.W.2d at 871 (emphasis added). If this characterization of the evidence is intended to convey the image of an execution-style killing for the purpose of concealing the identity of Rust, it does not fairly represent the record. It simply is not clear in the record that officer Wolf, with little more than "a second" to observe, (Exh. 3(a) (BOE), 275:1-2), actually saw Rust shoot Kellogg when Kellogg was lying helpless on the ground. The transcript reveals that Wolf said a number of things. At one point Wolf said Kellogg was shot "when he first started to fall." (Exh. 3(a) (BOE), 274:18-19). At another point Wolf said that he saw Kellogg shot "as he

went down." (Exh. 3(a) (BOE), 274:18-19). And at another point Wolf responded to the leading question: "As he was down?" by saying "Yes, sir." (Exh. 3(a) (BOE), 233:12-13). The evidence does not support the conclusion that Rust shot Kellogg as Kellogg lay helpless on the ground, rather, if Rust shot Kellogg, Kellogg died in a virtually instantaneous gun battle.[20]

The ultimate factual conclusion of the Nebraska Supreme Court in regard to aggravating circumstance "(b)" was that the "murder was part of the attempt to escape and so part of the effort to conceal their [evidently the robbers'] identity." **Id.** at 537, 250 N.W.2d at 873. But an attempt to escape is not necessarily the equivalent of an effort to conceal the identity of the perpetrator. The language and structure of the aggravating circumstance statute, **Neb. Rev. Stat.** § 29-2523 (Supp. 1974), does not treat a death occurring during an escape as equivalent to a murder to conceal the identity of the perpetrator. Aggravating circumstance "(b)" speaks in part about a murder to conceal the identity of the perpetrator. A murder taking place during an escape more clearly falls into, if any, aggravating circumstance "(g)" – the victim was a

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[20] Indeed, at a subsequent postconviction hearing, Wolf made clear that at no time did Rust ever stand over Kellogg and shoot down at Kellogg, but rather Kellogg was shot from about forty feet away, and subsequent shots were discharged when Kellogg had not quite hit the ground. (Exh. 14 (BOE), 551:22-552:14). Moreover, the sentencing panel in a planned poison death case distinguished Rust's case, among others, by stating that the " 'deaths were the almost instantaneous result of gunshot wounds.' " **Harper,** No. 872708, slip op. at 6 (quoting Order of Sentence).

law enforcement officer having custody of the killer – or aggravating circumstance "(h)" – the crime was committed to disrupt or hinder a governmental function or enforcement of the law. It is no doubt true that Rust tried to escape capture, but there is virtually no evidence to suggest that he intended to conceal his identity by killing Kellogg. As a consequence, there is every reason to believe that a sentencing panel properly instructed on the standard of proof would find that aggravating circumstance "(b)" had not been established beyond a reasonable doubt.

If aggravating circumstance "(b)" was not established beyond a reasonable doubt, assuming the doubtful proposition that the record is sufficient to support harmless-error analysis in the first place, then the most important premise of the State's argument fails – that "the sentencing panel would have found the same aggravating circumstances had they applied the beyond the reasonable doubt standard." Supplemental Brief of Respondent at 39 (emphasis added).[21] Accordingly, it cannot be concluded that the error was harmless beyond a reasonable doubt.

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[21] The Nebraska statute required and permitted the panel to weigh the aggravating circumstances and the mitigating circumstances. **Neb. Rev. Stat.** § 29-2522 (Supp. 1974). Since the panel found one mitigating factor, the failure of one aggravating circumstance to be proved makes it impossible to know what the panel would have done assuming no other conclusion of the panel changed. Resentencing then is the proper remedy. **See Barclay,** 463 U.S. at 955 (approving Florida's harmless-error doctrine which required resentencing if the trial court found that some mitigating circumstances exist); **cf. Stephens,** 462 U.S. at 873 n.12 & 890. The State concedes this point in its brief when it argues that the proper inquiry in this case is whether the

In summary, it cannot be concluded that the error in this case was harmless beyond a reasonable doubt

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evidence on aggravating circumstances was such that a reviewing court "would have found the **same** aggravating circumstances had they [sic] applied the beyond a reasonable doubt standard." Supplemental Brief of Respondent at 39 (emphasis added). Although not raised by the State, I am aware that the Supreme Court has heard argument in **Clemons v. Mississippi**, 535 So. 2d 1354 (Miss. 1988), **cert. granted**, 109 S. Ct. 3184 (1989) (argued Nov. 28, 1989). The Court granted review in that case to consider whether an appellate court may affirm a capital sentence after voiding one of two aggravating factors found in the trial court, without ordering a reweighing by a jury. **Clemons v. Mississippi**, No. 88-6873, 58 U.S.L.W. 3379, 3379-80 (U.S. argued Nov. 28, 1989). Regardless of the outcome in **Clemons**, the significance in this case of the failure to instruct the sentencing panel that it was required to find **each** aggravating circumstance beyond a reasonable doubt is that the error infected the entirety of the sentencing panel's efforts and was not limited to one piece of evidence or one aggravating circumstance. As consequence the error here cannot be considered harmless beyond a reasonable doubt. **See Satterwhite v. Texas**, 486 U.S. 249, 257-58 (1988). If the State were to change its position and contend that resentencing was not required even if the evidence indicates that the panel would not have found the **same** aggravating circumstances, and the court was inclined to allow the State to change its position, Rust should be given the opportunity to submit a supplemental brief addressing the evidence on each aggravating circumstance in relationship to the proper burden of proof. I note, although I do not make a finding, that I have serious doubts as to whether the evidence in this case supports two of the remaining three other aggravating circumstances found by the sentencing panel. I have concentrated on one aggravating circumstance in the text of these findings and recommendations because of the position taken by the State and because the aggravating circumstance reviewed fairly illustrates the difficulty in applying harmless-error analysis in this case. I have not intended to implicitly rule that the evidence is

because the fact-finding process was not adequate to build a record upon which harmless error analysis can be predicated. Moreover, the record establishes, for example, that aggravating circumstance "(b)" was not proved beyond a reasonable doubt, and thus the error cannot be construed to be harmless beyond a reasonable doubt.

D. Abstention is Appropriate

As indicated above, the issue in this case is identical to the issue addressed in **Holtan**, 838 F.2d at 984. In that case Judge Urbom ruled that a portion of the Nebraska death penalty statute was unconstitutional, and he also ruled that error occurred when the sentencing panel failed to ascertain whether the State had demonstrated aggravating circumstances beyond a reasonable doubt. **Id.** at 986. Chief Judge Lay, for the panel, concluded that the issue of constitutionality of the state statute was not ripe for decision. Judge Lay stated in a footnote: "Federal courts must avoid passing upon constitutional questions unless they are essential to the disposition of the issues before them." **Id.** at 986 n.3. Chief Judge Lay observed that "[w]ith one exception, all of these issues are intertwined with the state court's death sentence." **Id.** at 986 & n.4. Accordingly, the court abstained from passing on other issues raised by the appeal or cross-appeal and vacated the portion of the district court's opinion holding that the application of the Nebraska statute was unconstitutional. **Id.** at 986.

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sufficient regarding any of the three other remaining aggravating circumstances found by the sentencing panel.

The claims other than the **Holtan** claim advanced by Rust may be summarized as follows:

CLAIM 12B – INEFFECTIVE ASSISTANCE OF COUNSEL

. . . .

Petitioner is in custody, pursuant to a conviction and sentence obtained in violation of his constitutional right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments.

. . . .

12C – FAIR AND IMPARTIAL JURY

. . . .

Petitioner's Sixth and Fourteenth Amendment Constitutional rights were violated during the voir dire examination, in that the trial judge excused a prospective juror, upon his own motion, simply because the juror expressed some concern about the death penalty.

. . . .

Petitioner's conviction and sentence of death were also rendered in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States in that he was convicted by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution and the codefendant on the issue of Petitioner's guilt of the crimes with which he was charged.

. . . .

CLAIM 12D – GENERAL TRIAL ERROR

. . . .

Petitioner's conviction and death sentence were rendered in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, due to the improper comments by the prosecution regarding Petitioner's exercise of his privilege against self-incrimination by his failure to testify in his own behalf.

. . . .

Petitioner's conviction and death sentence were rendered in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, due to the fact that the trial judge overruled defense motions for the following:

(a) complete sequestration of the jury during voir dire examination; (Ex. 1, p.17; Exs. 55 and 56 and filing No. 28), sustained (Ex. 56, p.2);

(b) sequestration of the jury during trial, (Exs. 55 and 56);

(c) continuance of the trial; (Ex. 1, p. 20; Exs. 55 and 56, and filing No. 22); and

(d) change of venue. (Ex. 1, pp. 8, 17-18; Exs. 55 and 56, and filing No. 34).

. . . .

12E – GENERAL SENTENCING ERROR

. . . .

(a) Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of

the United States in that the sentencing panel received into evidence and relied upon certain information relating to the prior juvenile record of Petitioner after such information had been deleted from the record.

. . . .

Petitioner's death sentence was imposed in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that a presentence investigation was admitted into evidence and considered by the sentencing panel.

. . . .

Petitioner's sentence of death was imposed in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that Petitioner received a sentence of death while his co-defendant received a sentence of life imprisonment.

. . . .

CLAIM 12F – FELONY MURDER

. . . .

This claim is based, inter alia, on the following:

(1) Petitioner was charged and convicted of the crime of "felony murder," specifically, that he killed Michael Kellog in the perpetration or attempt to perpetrate a robbery.

(2) Felony murder provides that a homicide occurring during the perpetration or attempt to perpetrate a robbery is murder in the first degree.

(3) Felony murder provides that the turpitude involved in a robbery takes the place of deliberate, premeditated malice and the intent to kill is conclusively presumed from the criminal intention required for robbery.

(4) Felony murder permits conviction and possible capital punishment for all homicides committed in the perpetration or attempt to perpetrate certain prescribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind.

(5) Petitioner was denied the opportunity to submit "lesser-included offense" instructions for the jury's consideration during the guilt-innocence phase of his capital trial. (Based on existing Nebraska law in felony murder cases).

(6) The absence of "lesser-included offense" instructions, when a proper factual basis was present, unconstitutionally increased the risk that the jury could convict the petitioner when forced into an all-or-nothing choice between capital murder and innocence.

. . . .

CLAIM G – CRUEL AND UNUSUAL PUNISHMENT FURMAN CHALLENGES

. . . .

The imposition and execution of Petitioner's death sentence under Nebraska law and practice violate the constitutional rights guaranteed him by the Eighth and Fourteenth Amendments to the Constitution of the United States.

. . . .

CLAIM 12H – NEBRASKA DEATH PENALTY STATUTES

. . . .

The arbitrary and capricious application of Nebraska's death penalty statutes violates Petitioner's rights to due process and equal protection as guaranteed him by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

. . . .

Said statutes (specifically those listed below as (a) through (e)) were applied to Petitioner in violation of his rights to due process and equal protection as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States:

(a) NEB. REV. STAT. § 29-2523(1)(a);

(b) NEB. REV. STAT. § 29-2523(1)(b);

(c) NEB. REV. STAT. § 29-2523(1)(f);

(d) NEB. REV. STAT. § 29-2523(1)(h); and

(e) NEB. REV. STAT. § 29-2523(2).

. . . .

CLAIM 12 I – COMPARATIVE REVIEW OF A SENTENCE OF DEATH

. . . .

TRIAL ERROR – SUPPLEMENTAL POST CONVICTION

. . . .

CLAIM 12K – APPELLATE ISSUES
NOT ADDRESSED

. . . .

Brief of Petitioner at 3-58.

It thus appears that many of the claims, e.g., 12B – ineffective assistance of counsel, 12 C – general sentencing error, 12 G – Furman challenges, 12H – constitutionality of Nebraska death penalty statutes, and 12I – comparative review of death penalty cases, are intertwined with the state court's death sentence and the **Holtan** claim. However, some issues raise only purely trial error claims and would not necessarily be impacted by resentencing.

While I recognize that this case is somewhat different than **Holtan** in terms of abstention, I feel compelled to recommend that the court abstain from ruling upon all of the other issues raised by Rust. First, unlike most cases, Rust has explicitly requested that this court refrain from ruling upon all other issues which he has raised. It is thus not inconceivable that should resentencing take place, Rust would move to dismiss his amended complaint and the court would not need to resolve any of the other questions, including the trial error questions. Second, at the very least if this court were to be faithful to Judge Lay's abstention admonition in **Holtan**, the court would not rule upon any issues intertwined with the sentencing issue raised by Rust and ruled upon in **Holtan** until after the resentencing took place. Third, since the abstention issue is so important to questions of federalism and comity and because **Holtan** is not clear with regard to precisely when a district court should abstain in

a habeas corpus death penalty case from reaching constitutional questions where there are both trial and sentencing errors alleged to have taken place, this court should err, if it is to err, on the side of abstention.

IT IS RECOMMENDED TO THE HONORABLE WILLIAM G. CAMBRIDGE THAT:

1. Judgment be entered in favor of the petitioner and against the respondent providing that Rust's sentence shall be reduced to life imprisonment, unless within sixty (60) days after the judgment becomes final the State of Nebraska initiates capital resentencing proceedings:

2. This court stay consideration of all other substantive issues raised by Rust until Rust's sentence has been reduced to life imprisonment or he has been resentenced;

3. The foregoing stay be without prejudice to further consideration of the remaining issues at the appropriate time, with the court retaining jurisdiction for such purpose, but the judgment provided for in paragraph one (1) being considered final for purposes of appeal; and

4. Rust's objection to reassignment (filing 45) be denied.

DATED this 14th day of February, 1990.

/s/ Richard G. Kopf
Richard G. Kopf
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST, Petitioner, vs. STATE OF NEBRASKA, Respondent.	)	CV 87-L-340 MEMORANDUM OPINION AND ORDER (Filed May 13, 1991)

This matter is before the court on the Magistrate Judge's findings and recommendations (Filing No. 55), the respondent's objections (Filing No. 56) and the petitioner's response (Filing No. 57) to the respondent's objections.

I. FACTUAL BACKGROUND

The petitioner was sentenced to death on a felony murder charge and sentenced to sixteen and two-thirds to fifty years in prison on remaining charges. Direct appeal was taken and the trial court's decision was affirmed. The petitioner's challenges to the conviction and sentences under the Nebraska Postconviction Act were denied by a state district court, and that court's decision was affirmed by the Nebraska Supreme Court. The petitioner then sought relief in this court, but due to a lack of exhaustion as to certain claims the petitioner again sought postconviction relief in state court, which relief was denied. The petitioner also unsuccessfully sought state habeas corpus relief, essentially challenging conditions of confinement.

The petitioner then filed this action, filing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Filing No. 5). An amended petition was later filed (Filing Nos. 31 and 40). The case was originally assigned to Judge Urbom and later reassigned to the undersigned Judge (Filing Nos. 41 and 42). The petitioner objected to the reassignment (Filing No. 45), and in making his findings and recommendations the Magistrate Judge recommended that the reassignment be denied.

Pursuant to a pretrial conference, the Magistrate Judge determined that the primary issues for consideration were: (1) whether, in light of *Holtan v. Black*, 838 F.2d 984, 986 (8th Cir. 1988), this case should be remanded for resentencing to a state court sentencing panel, assuming that the record does not affirmatively demonstrate that the previous panel, in imposing the death sentence, found that the state had demonstrated aggravating circumstances beyond a reasonable doubt; and (2) how and when the remaining issues raised by the petitioner were to be dealt with (Filing No. 50).

II. DISCUSSION

The Magistrate Judge found that the issue which he referred to as "the *Holtan* issue"[1] was fairly presented.

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[1] The magistrate judge characterized the *Holtan* issue as follows:

> (a) the sentencing panel which imposed the death sentence had no clear guidance as to the correct standard of proof – proof beyond a reasonable doubt – to apply in finding aggravating circumstances; (b) the sentencing panel failed to find aggravating

The Magistrate Judge also found that the petitioner was denied due process of law in that the sentencing panel was not provided with sufficiently clear instructions as to the applicable standard of proof and that in this situation the harmless-error analysis is improper as, under that analysis, the petitioner would be denied due process of law since he would lose his right to the exercise of the sentencing panel's discretion.

The Magistrate Judge also found that the error in this case was not harmless beyond a reasonable doubt because the fact-finding process was not adequate to build a record upon which harmless-error analysis can be predicated. In conjunction with his analysis, the Magistrate Judge found that a sentencing panel properly instructed on the standard of proof would find that aggravating circumstance "(b)"[2] had not been established beyond a reasonable doubt. Assuming, then, for the sake of argument that the record in this case is sufficient to support harmless-error analysis, then the state's argument that had the panel applied the reasonable doubt

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> circumstances by proof of any standard; (c) the Nebraska Supreme Court first announced the proof beyond-a-reasonable-doubt standard at the time of Rust's direct appeal; and (d) the Nebraska Supreme Court applied that holding to Rust on appeal, without remand for resentencing.

(Filing No. 54, at 1-2).

[2] Aggravating circumstance "(b)" provides: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." NEB. REV. STAT. § 29-2523(1)(b) (Reissue 1989).

standard it would have found the same aggravating circumstances must fail.[3]

The Magistrate Judge determined that this court, in deciding this case, is bound by *Holtan*, 838 F.2d at 986, in which the Eighth Circuit Court of Appeals stated that the sentencing panel's failure to ascertain whether the state had demonstrated aggravated circumstances beyond a reasonable doubt required resentencing.

Finally, the Magistrate Judge recommended that the court abstain from ruling on all other issues raised by the petitioner for three reasons. First, the Magistrate Judge noted that, depending on the subsequent action of the petitioner in this case, it may become unnecessary for the court to decide those issues. Second, the Eighth Circuit in *Holtan*, 838 F.2d at 986 & n.4, declined to rule on any issues intertwined with the sentencing issue. Third, the Magistrate Judge concluded that the court, if it is to err in

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[3] The court notes that, subsequent to the filing of the Magistrate Judge's findings and recommendations, the Supreme Court held in *Clemons v. Mississippi*, 58 U.S.L.W. 4395 (U.S. Mar. 1990) that it is constitutionally permissible for an appellate court to reweigh aggravating and mitigating factors to uphold a jury-imposed death sentence based in part on *an* invalid or improperly defined aggravating circumstance. *Clemons*, 58 U.S.L.W. at 4397-98. The court finds that *Clemons* is distinguishable from the case before this court, however, as in this case the sentencing panel was not instructed to find *each* aggravating circumstance beyond a reasonable doubt. Therefore, the error was not limited to one piece of evidence or one aggravating circumstance as in *Clemons*, but rather affected the "entirety of the sentencing panel's efforts" in this case (Filing No. 54), and the error cannot be considered harmless beyond a reasonable doubt.

this regard, should err on the side of abstention, as the abstention issue is crucially important to the issues of federalism and comity and as *Holtan, id.*, did not provide clear guidance as to precisely when a district court should abstain in a habeas corpus death penalty case from reaching constitutional questions where both trial and sentencing errors are alleged.

The respondent has objected to the Magistrate Judge's findings and recommendations in their entirety, relying principally on the same arguments originally presented to the Magistrate Judge. *Compare* Respondent's Supplemental Brief of Respondent (submitted to the Magistrate Judge) *with* Respondent's Brief in Support of the Respondent's Objection to the Magistrate's Recommendations (submitted to the undersigned Judge and adding only one new argument, which relates to the abstention issue).

The court has reviewed the findings and recommendations pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 49(B) and finds that they should be adopted.

IT IS ORDERED:

1. The Magistrate Judge's findings and recommendations (Filing No. 55) are adopted;

2. The respondent's objections to the Magistrate's findings and recommendations (Filing No. 56) are denied;

3. The petitioner's response to the respondent's objections (Filing No. 57) are granted;

4. The petitioner's objection to reassignment (Filing No. 45) is denied;

5. Judgment shall be entered in favor of the petitioner and against the respondent providing that the petitioner's sentence shall be reduced to life imprisonment, unless within sixty (60) days after the date of the entry of judgment in this case, the respondent initiates capital resentencing proceedings;

6. This court shall stay consideration of all other substantive issues raised by the petitioner until the petitioner's sentence has been reduced to life imprisonment or until he has been resentenced; and

7. The stay imposed in paragraph six (6) shall be without prejudice to further consideration of the remaining issues at the appropriate time, with the court retaining jurisdiction for such purpose, but the judgment provided for in paragraph five (5) be considered final for purposes of appeal.

DATED this 13 day of May, 1991.

BY THE COURT:

/s/ William G Cambridge
William G. Cambridge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST, Petitioner, vs. FRANCES X. HOPKINS, WARDEN, Respondent.	)	CV 87-L-340 MEMORANDUM OPINION

The United States Court of Appeals for the Eighth Circuit has remanded this case, directing that the "district court [is] to pass on the remaining issues within ninety days." **Rust v. Clarke**, 1992 U.S. App. LEXIS 5397, at 3 (8th Cir. Mar. 26, 1992).[1] I have granted the petitioner's

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[1] In this connection, I have reached each issue raised by Rust – including those challenging the constitutionality of Nebraska statutes and others which are intertwined with sentencing – notwithstanding the court's opinion in **Holtan v. Black**, 838 F.2d 984, 986 & nn. 3-4 (8th Cir. 1988). In the opinion remanding this case to me, no mention of **Holtan** is made, even though abstention pursuant to **Holtan** was discussed in detail by the parties at the pretrial conference before the magistrate judge, briefed by the parties, dealt with by the magistrate judge in his report and recommendation and discussed by me in my memorandum opinion. Even counsel for the State of Nebraska stated at the pretrial conference that she was confused by a portion of **Holtan** (Filing 66, TR 9:2-11:19). It is respectfully suggested that the abstention discussion in **Holtan** be clarified. I note that precisely the same error occurred in this case as in **Holtan**, and it was treated as dispositive by **Holtan**. In **Holtan**, the court remanded for resentencing and ordered abstention on all other issues, at least one of which was not clearly intertwined

motion to amend the petition and to substitute a party.[2] (Filings 68 and 69). Pursuant to the order of the United States Court of Appeals for the Eighth Circuit, I now file this memorandum opinion in conformity with the court's direction. Contemporaneously with the filing of this memorandum opinion, I now file a judgment in conformity with this memorandum opinion and my previous opinion and judgment (Filings 58 and 59). In summary, I now find that the petitioner (Rust) was denied effective assistance of counsel at sentencing, and as I earlier found that Rust was denied due process of law regarding the standard of proof to be employed at sentencing regarding aggravating circumstances, I shall order that Rust's sentence be reduced to life imprisonment, unless within sixty (60) days after the judgment becomes final the State of Nebraska initiates capital resentencing proceedings. As to Rust's other claims, I find them without merit, and I shall enter judgment for the respondent.

I turn to Rust's claims.[3]

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with sentencing. **Id.** at 986 n.4. In this case, following **Holtan** on the same dispositive issue, I ordered resentencing but abstained on all other issues, some of them intertwined with sentencing and others not, because I felt compelled to do so as a result of **Holtan.**

[2] Frances X. Hopkins has replaced Harold W. Clarke as Warden of the Nebraska State Penitentiary.

[3] The respondent complains that Rust has been allowed to file three successive petitions for relief and should thus be barred from prosecuting this case under the provisions of Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Brief of Respondent at 2. Among other things, Rule 9(b) prohibits successive petitions when the "prior determination was on the merits." The first petition was dismissed without prejudice (Exhibit 42) in order that Rust could

I. Ineffective Assistance of Counsel – Claim 12B

Claim 12B of the amended petition alleges that Rust's trial and appellate counsel were ineffective. Rust makes the following specific objections regarding the performance of his trial and appellate counsel:

> Petitioner's trial counsel failed to render competent assistance to the Petitioner in the following respects:
>
> (1) failure of counsel to make an opening statement to the jury;
>
> (2) failure of counsel to prepare his own Motion for New Trial;
>
> (3) failure of counsel to argue orally his Motion for New Trial;
>
> (4) failure of counsel to attend the hearing of August 6, 1975, at which ground rules for sentencing were set forth (requiring substitute counsel);
>
> (5) Failure of counsel to attempt to discover the nature of the sentencing ground rules;

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exhaust his claims. The next petition (Filing 5) was filed on June 9, 1987. This petition was amended (Filing 31) July 6, 1988, by stipulation (Filing 28). The argument advanced by respondent is thus without merit, and borders on being frivolous. Respondent further raises certain arguments regarding exhaustion which will be dealt with in the text. Unless noted in the text, the respondent makes no other argument of lack of exhaustion. With the one exception noted in the text, Rust has not requested an evidentiary hearing. Nor did the respondent request an evidentiary hearing.

(6) failure of counsel to adequately impeach or attack the credibility of the State's witnesses after obvious inconsistencies appeared in their testimony;

(7) failure of counsel to adequately investigate the case by not taking the Petitioner with him to view the scene of the crime;

(8) failure of counsel to take depositions of State's witnesses even after the court ruled allowing these depositions to be taken;

(9) failure of counsel to file pre-trial motions until three days after the pre-trial motions hearing;

(10) failure of counsel to adequately prepare to present evidence and argument in support of pre-trial motions;

(11) failure of counsel to adequately discuss trial strategy with Petitioner prior to trial and during trial;

(12) failure of counsel to discuss the evidentiary and procedural aspects of the sentencing hearings adequately and fully with the Petitioner prior to said trial;

(13) failure of counsel to bring to the attention of the court or jury the legal and factual defense that the robbery underlying the charge of felony murder had terminated prior to the shooting that resulted in the death of

Michael Kellogg by any of the following methods, namely: Plea in Abatement, appropriate pre-trial Motions to Dismiss, argument to the jury, presentation of evidence, Motion to Dismiss at the end of the State's case in chief, proposed jury instructions presented to the court prior to submission of the case to the jury, final argument to the jury, Motion for New Trial, and on appeal of the instant case to the Supreme Court of the State of Nebraska and the United States Supreme Court;

(14) failure of counsel to call to the attention of the trial court the fact that Petitioner was dissatisfied with the representation he was being afforded by counsel and by failing to request a hearing on Petitioner's expressed intention, expressed both verbally and in written form, to have other counsel appointed for him;

(15) failure of counsel to introduce evidence at the sentencing hearings on mitigating factors other than those prescribed by the Statutes of the State of Nebraska;

(16) failure of counsel to adequately object to the trial court's various rulings permitting voir dire of the prospective jurors in groups as opposed to conducting the voir dire of the prospective jurors individually;

(17) failure of counsel to examine and study the police reports and other

matters made available through discovery prior to the trial of the case and by failing to discuss said reports and other discovery material with Petitioner prior to trial;

(18) failure of counsel to adequately pursue and develop any possible plea bargains and by failing to keep Petitioner advised of any possible plea bargains; and by failing to make known to the sentencing court the fact that the prosecutor and defense counsel had, prior to trial, discussed a possible plea bargain in the matter and that defense counsel did not make known to the sentencing court the existence of these discussions and possible plea bargain during the sentencing hearings;

(19) failure of counsel to adequately examine, utilize, and present the presentence investigation prepared on the Petitioner at the various sentencing hearings held herein;

(20) failure of counsel to pursue the possibility of a psychiatric defense and failure to offer psychiatric evidence in mitigation at sentencing where it was indicated that Petitioner did not suffer from a mental defect;

(21) failure of counsel to determine that an insanity defense existed when defense counsel was aware, or should have been aware, that Dr. Farrell had examined Petitioner and labeled him violent and a sociopath;

(22) failure of counsel to call a witness favorable to the Petitioner at the sentencing hearing;

(23) failure of counsel to review the Adult Probation Office's presentence investigation report with the Petitioner;

(24) failure of counsel to read the presentence investigation report, wherein a recommendation of "incarceration" was made;

(25) failure of counsel to renew a pretrial Motion to Sever after co-defendant's lawyer blamed Petitioner for the killing in his opening statement;

(26) failure of counsel to move for a mistrial based on introduction of evidence of an alias allegedly used by Petitioner;

(27) failure of counsel to move for a mistrial when evidence was presented indicating that the weapon used in the robbery was stolen;

(28) failure of counsel to call defense witnesses requested by Petitioner regarding inconsistencies in the change of custody of the alleged bullet that was the cause of Michael Kellogg's death;

(29) failure of counsel to apprise the court of the plea bargain negotiations and that it was grossly inconsistent on the State's part to consider a plea bargain before trial but ask for the death penalty after trial;

(30) failure of counsel to prepare for trial – evidence is overwhelming that defense counsel continually attempted to convince Petitioner to plead guilty by suggesting that sentencing court would be more lenient;

(31) failure of counsel to inform the sentencing court that the State, prior to trial, while in full possession of the facts surrounding the crime, was willing to negotiate a plea bargain for Petitioner's life;

(32) failure of counsel to inform the court of the sentencing inconsistencies wherein the court noted at the September 4, 1975, sentencing hearing that the State had presented evidence of two aggravating circumstances and, then, at the time the opinion was rendered, finding that four aggravating circumstances had been performed;

(33) failure of counsel to poll the jury;

(34) failure of counsel to present the sentencing court with a letter from the Minnehaha County, South Dakota county attorney wherein he, unsolicited, labeled Ell as the more violent of the two suspects;

(35) failure of counsel to point out to the sentencing court that its sentencing opinion contained the erroneous impression that Petitioner was seen standing directly over Michael Kellogg in the backyard at 2519 Sharon

Drive, shooting down into Michael Kellogg while he lay helpless – the evidence presented both at trial and at the post-conviction hearing does not bear this impression out;

(36) failure of counsel to point out to the sentencing court that Michael Kellogg had already fired a shot and was attempting to shoot again at the time that he was killed, rather than laying helpless as the court's sentencing opinion indicates;

(37) failure of counsel to present evidence to the sentencing court which would tend to prove that aggravating circumstances B and H would not apply to Petitioner (shooter not trying to conceal identity nor trying to avoid capture, but rather, trying to save his own life);

(38) failure of counsel to point out to sentencing court that a previous assault conviction of Petitioner Rust occurred when he was only 17 years old;

(39) failure of counsel to develop sociopathic evidence that the sentencing court could have then found that mitigating circumstance G applied to Petitioner Rust.

Petitioner was again rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution in that Petitioner's appellate counsel, a member of the staff of the Douglas County Public Defender's Office failed to render

> competent and effective assistance to Petitioner on the original appeal of this case to the Nebraska Supreme Court in the following respects:
>
> (1) by failing to raise the issue of whether or not the felony of robbery, which underlied [sic] the charge of felony murder, had terminated prior to the time that Michael Kellogg was shot;
>
> (2) by failing to raise the issue of ineffective assistance of trial counsel based upon the reasons enumerated above.[4]

(Filing 31).

A. Exhaustion

The respondent argues that claim 12B(5) is not exhausted. Claim 12B(5) pertains to the alleged failure of counsel to attempt to discover the nature of the sentencing ground rules.

This claim was presented to the state district court in Rust's first motion for post-conviction relief and later to the Nebraska Supreme Court on appeal from the district court's denial of the request for post-conviction relief (Exhibit 32, Amended Motion to Vacate and Set Aside ¶ 1c; Exhibit 35, Brief of Appellant Before Supreme Court of Nebraska [hereinafter Exhibit 35, Brief of Appellant] ¶ IIB2, at 57-58). The claims of ineffective assistance have been exhausted.

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[4] Claim 12B(3) has been withdrawn. (Filings 68 and 69).

B. Merits

In **Strickland v. Washington**, 466 U.S. 668 (1984), the United States Supreme Court set forth the following standards to judge claims of ineffective assistance of counsel. In order to prevail, it must be established that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. **Id.** at 687-96.

As to the first prong of the test:

(1) The proper standard of judging an attorney's performance is that of reasonably effective assistance, considering all of the circumstances;

(2) When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness;

(3) Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time;

(4) A court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance.

Id. at 687-91.

With regard to the required showing of prejudice:

(1) The proper standard requires that the defendant show there is a reasonable probability that, but for counsel's professional errors, the result of the proceedings would have been different;

(2) When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt;

(3) When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death;

(4) A reasonable probability is a probability sufficient to undermine confidence in the outcome;

(5) A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Id. at 691-96.

(1) Errors Affecting Guilt

As the Supreme Court indicated in **Strickland**, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent

the errors, the factfinder would have had a reasonable doubt respecting guilt." **Id.** at 695. Thus, even if there was error in counsel's performance, if there is not a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt, then the claim of ineffective assistance of counsel must fail.

As the Nebraska Supreme Court indicated in **State v. Rust**, 208 Neb. 320, 303 N.W.2d 490, cert. denied, 454 U.S. 882 (1981) [hereinafter Rust II], Rust's trial counsel was confronted with persuasive evidence that Rust killed Kellogg. **Id.** at 325, 303 N.W.2d at 494. The magistrate judge in this case has extensively recounted the trial testimony of Officer Wolf, the eyewitness to part of the shooting (Filing 55, Magistrate's Findings and Recommendations at 79-89). I shall briefly summarize the evidence.

During the trial of this case, Officer Wolf testified on direct examination that he first saw Kellogg on a sidewalk, and the man later identified as Rust was running toward a fence. Kellogg shouted to the man to stop, and then Kellogg fired "shots" at the man. The man appeared to slump as though he had been shot. The man was then chased by Kellogg. The officer followed Kellogg. Kellogg fired another shot at the man. The officer heard an exchange of gunfire and, for at least a moment, could not see Kellogg and the man. The officer proceeded around the house and saw Kellogg slumped over. The officer saw a party in a blue parka with a gun, and the man fired "probably" one or two more shots at Kellogg as he went down.

As the officer stepped around the corner, he tried to shoot the man with his shotgun. The shotgun did not fire,

however, and the man turned around and shot the officer. Officer Wolf testified that he got a good look at the gunman and could positively identify the gunman.

On cross-examination, Officer Wolf testified that he did not see the first shot or shots that struck Kellogg. However, Officer Wolf testified that he did see Rust shoot Kellogg after Officer Wolf came around the corner of the house. Officer Wolf testified at trial that he was able to make this observation from about thirty feet away. I note that the shooting occurred during the daytime.

In addition to the evidence recounted by the magistrate judge in his previous report and recommendation, I note the following. The ballistic evidence confronting trial counsel was persuasive. Indeed, in the first appellate brief to the Supreme Court of the State of Nebraska, appellate counsel, who were different from trial counsel,[5] recited the ballistic evidence this way: "An FBI firearms expert testified that the bullets killing Michael Kellogg and injuring Officer Wolf were fired from the weapon recovered from the defendant's hiding place immediately after his capture." (Exhibit 6, Brief of Appellant Before Supreme Court of Nebraska [hereinafter Exhibit 6, Brief of Appellant] at 10). A review of the trial transcript confirms this summary. (Bill of Exceptions [hereinafter BOE], Exhibit 3(a), TR 363:9-365:9; BOE, Exhibit 3(b) (also identified as Exhibit 22), TR 489:4-491:22.)

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[5] Appellate counsel included Frank B. Morrison, Douglas County public defender, Stanley A. Krieger, assistant Douglas County public defender, David E. Kendall and Peggy C. Davis of New York, and Anthony G. Amsterdam of Stanford University Law School.

Thus, an extremely difficult case confronted trial counsel. He had eyewitness testimony that Rust had shot Kellogg. He was also confronted with ballistic evidence which established that the bullets which killed Kellogg and injured Officer Wolf were fired from a weapon recovered near where Rust was hiding.

In his brief to this court Rust spends little time arguing the facts regarding his claim of ineffective assistance of counsel. He relies primarily upon the fact that his codefendant, Ell, was granted a mistrial because of the jury's inability to reach a decision on the murder charge and the fact that after he was retried, convicted, and sentenced to life in prison, Ell testified at Rust's post-conviction hearing that he, not Rust, had fired the shots that killed Kellogg. However, Rust's present counsel fails to explain how this evidence is probative that trial counsel's performance was deficient or that trial counsel's performance was prejudicial to Rust.

Indeed, under examination by a state district court judge in the first state post-conviction proceeding, Rust testified that he did not tell his trial counsel the truth and that he told his trial counsel, because trial counsel had not come up with a better defense, that he (Rust) just happened to be in the neighborhood during the shooting. Rust maintained this position throughout his trial, sentencing, and appeal. The colloquy between Rust and the state district judge is as follows:

> Q. Mr. Rust, as I understand it, you told [trial counsel], your counsel, that the defense, that you were just happening to be in the neighborhood while walking by, was as good as any?

A. Yes, because he hadn't come up with any halfway through the trial, and that stuff that was in the police report of Officer Pecha or Peck or whatever his name is, and since he hadn't come up with a defense by then, I felt it was better than nothing at all.

Q. Why didn't you tell him the truth? That defense was not – obviously not the truth, was it?

A. No.

Q. Why do you think that a defense that is not the truth is as good as any, including the defense that you claim is the truth?

A. He didn't come off with anything, and that was better than just sitting there doing nothing.

Q. But, it wasn't as good as the defense that you claim is the truth.

A. The actual truth would have been a lot better, but I didn't see any sense in it.

Q. Assuming that you accepted that defense, you knew that Ell then had been caught with the money or the money was found where Ell was and found a gun with Ell, that means that the whole blame for this would have been placed upon Ell, is that what you wanted to do?

A. Not really. But, I just couldn't sit there and see him do nothing.

Q. Now just assuming that the other fellow was dead and your statement that you just happened to be in the neighborhood, supposing that had been accepted, then the whole blame for this would have been placed upon Ell, wouldn't it?

A. Yes, if they had accepted it.

Q. Isn't there something in your "code" as you call it, about placing the blame for a felony or something wrong upon your buddy?

A. As far as the testimony goes that day, I seriously doubt if anybody would have accepted that at all, but it's better than nothing at all, because it was about two-thirds of the way through the trial when Officer Pecha or Peck or whatever his name was, when he was up on the stand.

Q. Then, you were convicted. You knew that you were coming before a three-judge panel, didn't you?

A. Yes, sir.

Q. And, you knew that we were going to discuss the death penalty, didn't you? Didn't you think it was a good time to tell your lawyer then what the truth was?

A. I figured I was going to get a life sentence because [trial counsel] said that no one would hand out the death sentence here in Nebraska and they hadn't done it for a long time, and that he kept assuring me that I wasn't going to get the death penalty. He assured my mother, and my mother's friend.

Q. Well, then you did get the death penalty?

A. Yes.

Q. Didn't you tell him the truth then? Why didn't you tell him the truth then?

A. When the sentence had been handed down, it was a little late then.

Q. Well, you knew it was going up on appeal, didn't you? Wasn't that a good time to raise it?

A. I figured a good time to raise it, the way I understood it, the only thing you could appeal on was what was represented on the record.

Q. But, you didn't tell him then either?

A. Nope.

(BOE, Exhibit 13, TR 436:20-439:13).

Moreover, it appears that Rust specifically instructed his trial counsel not to try to shift the blame for the killing to Ell or anyone else. According to Rust's trial counsel, trial counsel for Ell "was trying to shift the blame onto Mr. Rust" (BOE, Exhibit 12, TR 149:12-16). Rust's trial counsel conferred with Rust about this problem and made recommendations. In response, "what Mr. Rust kept telling me [was] I'm not going to blame somebody else or pin the rap on somebody else." (BOE, Exhibit 12, TR 149:23-24).

It is evident that trial counsel was confronted with an extremely difficult case. Trial counsel was confronted with a police officer who saw Rust shoot Kellogg and was, in turn, shot by Rust. The ballistic evidence strongly corroborated the testimony of the police officer. If one believes the subsequent testimony of Rust and his codefendant, Rust lied to his trial counsel about who actually did the shooting. Rather than tell his trial counsel the truth, Rust concocted the incredible story that the shootout occurred as he was passing through the neighborhood. Moreover, Rust was "not going to blame somebody else." (BOE, Exhibit 12, TR 149:23-24). Under these circumstances, there is no reasonable probability, absent the

errors attributed to trial counsel, that the fact-finder would have had a reasonable doubt respecting guilt. **Strickland**, 466 U.S. at 695.

(2) Sentencing Error

Once again, Rust's present counsel does not discuss in any detail in the brief in support of the present petition for writ of habeas corpus the facts of Rust's claim of ineffective assistance of counsel at sentencing. Rather, Rust relies on previous briefs submitted to the Nebraska Supreme Court.[6] The Nebraska Supreme Court has twice considered and rejected these claims. **Rust II**, 208 Neb. at 324-26; 303 N.W.2d at 493-94; **State v. Rust**, 223 Neb. 150, 155-57; 388 N.W.2d 483, 490 (1986) [hereinafter **Rust III**], **cert. denied**, 481 U.S. 1042 (1987).[7]

The previous briefs of the parties set forth an extensive recitation of facts regarding the claim of ineffective assistance of counsel at sentencing. See particularly Exhibit 35, Brief of Appellant, and Exhibit 7, Brief of Appellee in the Supreme Court of Nebraska [hereinafter Exhibit 7, Brief of Appellee].

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[6] This practice was followed by both parties. It is confusing to incorporate by reference arguments previously made in other briefs.

[7] A state court's finding of fact regarding a client's claim of ineffective assistance of counsel is not binding on a federal court when assessing either the performance or prejudice components of the effectiveness inquiry since such inquiry involves mixed questions of law and fact. **Strickland**, 466 U.S. at 698.

(a)

Having carefully reviewed the record, I conclude that insofar as claims of sentencing error are concerned, except as subsequently noted, the claims of ineffective assistance of counsel, even if true, did not result in prejudice which would have changed the sentencing outcome. I shall briefly discuss these claims and the reasons why I am not persuaded that Rust was prejudiced.

Rust argues that his trial counsel failed to attend a hearing where sentencing ground rules were discussed. While this is true, another public defender did attend. Rust does not point out how his trial counsel was impaired by this failure to attend.

Rust argues that his trial counsel should have presented psychiatric testimony in mitigation. An Omaha psychiatrist had previously labeled Rust violent and a sociopath. It is hard to see how this evidence would have been helpful to Rust if presented at the sentencing hearing. In fact, had trial counsel presented this evidence it might have constituted prejudicial ineffective assistance of counsel. **Otey v. Grammer,** 869 F.2d 1137, 1140 (8th Cir. 1989) (Heaney, J., dissenting from denial of petition for rehearing en banc, joined by Chief Judge Lay and Judge McMillian) (stating evidence that defendant was a sociopath is irrelevant as a mitigating circumstance and defense counsel's offer of such evidence at sentencing constituted prejudicial ineffective assistance of counsel).

Moreover, this evidence simply is not sufficient on its face to suggest that Rust's trial counsel should have inquired further about Rust's mental state. I believe the report to which the parties refer is contained within

Exhibit 17, one of trial counsel's files. The report, entitled "Neuropsychratic [sic] Examination," is dated March 22, 1975, and was authored by C.H. Farrell, M.D. The doctor found that Rust had an "aggressive sociopathic personality," that there was no psychosis, and that Rust was "able to aid in his own defense."

Rust argues that his trial counsel was deficient in failing to point out that the presentence report suggested that incarceration was appropriate for Rust. However, the presentence report was offered and received in evidence, and the sentencing panel was undoubtedly familiar with it. The presentence report appears as Exhibit 29.

Rust argues that his trial counsel failed to point out that a previous assault conviction occurred when Rust was only seventeen years old.[8] However, the sentencing panel had the precise date of this conviction and knew Rust's age.

Rust argues that his trial counsel was deficient in failing to inform the sentencing court that the prosecutors had discussed with the defense, prior to trial, the possibility of a plea bargain. The record reflects, however, that nothing definite concerning a plea bargain was ever agreed upon. Trial counsel testified at the state postconviction proceeding that had the State made a firm offer and been willing to settle "for less" he would have advised the sentencing panel.

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[8] This conviction appears to have taken place when Rust was eighteen, not seventeen. See Presentence Report, Prior Arrests, regarding the matter of August 22, 1969. Rust's date of birth is July 25, 1951. (Exhibit 29).

Rust complains that his trial counsel failed to call as a witness or depose a federal probation officer in South Dakota who had allegedly had favorable things to say about Rust. The evidence reflects that at one point the federal probation officer indicated that the federal judge he served had made a grave mistake in sentencing Rust in a prior matter. The federal probation officer was interviewed by trial counsel and told counsel he would deny ever having made that statement. The probation officer told trial counsel he would not repeat several statements because he was presently working for the federal judge in South Dakota. The federal probation officer was not specific about the nature of the so-called "grave mistake."

Whether or not to call a reluctant witness who would deny making the statements attributed to him is obviously a difficult question. At most, the probation officer's testimony would simply have questioned the judgment of the South Dakota judge and would not have eliminated the basis for the previous conviction.[9]

Rust argues that his trial counsel was in error for failing to hold the State's counsel to the sentencing judge's admonition that the State would be limited to presenting evidence regarding only aggravating circumstances "a" and "f" unless notice was given by the State.

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[9] As discussed in more detail later, Rust complains, and I find, that his trial counsel did not consult with him about sentencing strategy. If trial counsel made the decision not to call the probation officer as a witness without consulting Rust, this would only add to my concern about trial counsel's failure to consult with Rust about important sentencing decisions. Nonetheless, as indicated in the text the probation officer's testimony would not have been especially significant.

Rust then goes on to argue that his trial counsel did not object when other evidence – apparently Rust's criminal record compiled by the probation officer and the transcript of the trial testimony regarding how Kellogg was killed – was offered regarding other aggravating circumstances. Whatever the notice requirements might have been, the presiding sentencing judge, later at a postconviction proceeding, indicated that the State's counsel was not limited in any way.

Moreover, the presiding judge recounted that the discussion regarding aggravating circumstances "a" and "f" had to do with the record as it existed at the time of the discussion. The judge noted that the record subsequently developed by the probation officer regarding Rust's criminal record could not have been the subject of the court's order since the criminal record had not been compiled by the probation officer at the time the discussion took place.

In any event, it seems clear that any alleged failure of the State to give notice did not surprise anyone, that the probation officer's compilation of Rust's criminal history was anticipated by everyone, and that the evidence offered by the State regarding the manner in which Kellogg was killed, and which formed the predicate for the court's finding of aggravating circumstances "b," "f," and "h," was based on the transcript of trial and therefore the facts were well known to both Rust and his trial counsel.

Rust complains that his trial counsel failed to call to the attention of the sentencing panel a letter from a South Dakota prosecutor concerning Rust's codefendant's alleged violent tendencies. Given the fact that Rust was

not forthcoming with his counsel about who actually fired the shots, and given the fact that Rust advised his trial counsel not to shift the blame to his codefendant, this letter had virtually no relevance to Rust's sentencing proceeding.

(b)

I turn next to certain errors alleged by Rust which are very troubling, and which, taken together, entitle Rust to a new sentencing hearing. For practical purposes, these errors may be separated into two different, but related, categories.

The first category of error has to do with claims 12B(11) and (12), the failure of counsel to discuss with Rust sentencing strategy and the evidentiary and procedural aspects of the sentencing hearings adequately and fully prior to the sentencing proceeding. The second category of error has to do with claims 12B(35), 12B(36), and 12B(37), regarding the failure of Rust's trial counsel to point out to the sentencing court the manner in which Kellogg was killed and counsel's failure to present evidence in this regard.

I turn first to Rust's claim that his trial counsel failed to discuss the sentencing proceedings with him in any detail. Rust testified that after the trial ended in August, 1975, until sentence was pronounced on October 30, 1975,[10] his trial counsel never personally visited with him.

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[10] There were three substantive sentencing proceedings (Exhibit 4). Evidence was taken on September 4, 1975, regarding

Rust testified that he might have had one, two, or three telephone conversations with his trial counsel, who by then resided in South Dakota. Rust testified that only one of the telephone calls was initiated by his trial counsel. Those conversations had something to do with potential witnesses – Rust's former girlfriend and the federal probation officer discussed earlier. Rust testified that his counsel never discussed with him what evidence the State might present regarding aggravating circumstances. Rust further testified that his trial counsel never discussed with him what mitigating circumstances meant under the relevant statutes. Rust further testified that his trial counsel did not inform him that the presentence report contained a recommendation for incarceration.

The clear import of Rust's testimony is that he was left in the dark by his trial counsel. The pertinent portions of Rust's testimony are reproduced verbatim below:

> Q. All right. The trial ends in the first part of August, and I would like to ask you if between the end of the trial and the first hearing on sentencing on August 6, 1975 whether you had an opportunity to visit with [trial counsel]?
>
> A. Between the first – between the first?
>
> Q. Yes, between the time that the jury comes in with the guilty verdict against you and the first hearing on sentencing, which was held August 6, 1975.
>
> A. No.

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aggravating circumstances. Evidence was taken on September 30, 1975, regarding mitigating circumstances and the case was argued. The death penalty was pronounced October 30, 1975.

Q. You didn't visit with [trial counsel]?

A. No.

Q. All right. Do you recall the date August 6, 1975?

A. Yes.

Q. Now, on that day the record reflects that a hearing was held in this Court to discuss the ground rules and the procedures for the sentencing of you in this case, is that correct?

A. Yes.

Q. Was [trial counsel] present at that hearing?

A. No.

Q. When did you – strike that. At this time, [trial counsel] had been appointed to represent you on the sentencing in your case?

A. I assume so. I –

Q. Pardon?

A. I assume he was. He was supposed to see about it.

Q. All right. And, you say he was not here at that hearing?

A. No.

Q. When did you first learn that he would not be at the August 6, 1975, hearing?

A. Mr. Hornstein come in and asked me if [trial counsel] was going to be there, and I said, "I don't know."

Q. Do you recall what time the hearing was supposed to start?

A. Some time in the afternoon about 1 or 2, somewhere – 1:30, somewhere around there.

Q. Did the hearing start on time?

A. No, Mr. Hornstein went out somewhere and he come back and he said that [trial counsel] wasn't going to be here today, and I assumed he made a phone call to South Dakota.

Q. Okay. Had you ever seen Mr. Hornstein before?

A. No, not until that hearing.

Q. You met him at your hearing on the ground rules and procedures for sentencing?

A. Yes.

Q. And, did you, prior to that hearing, have a chance to confer with Mr. Hornstein on what was going to happen at the hearing?

A. No.

Q. How about after the hearing, did you have a chance to visit with him on that?

A. No.

Q. You did not visit with him then, is that what you're saying?

A. No, they took me back up in jail.

THE COURT: I think this would be a good time to take a break.

(At this point, the Court recessed from 3:10 p.m. to 3:25 p.m.)

JOHN EDWARD RUST, RESUMED THE WITNESS STAND AND TESTIFIED FURTHER, AS FOLLOWS:

DIRECT EXAMINATION (Cont'd)

BY MR. MORAN:

Q. All right. Mr. Rust, we ended up before the recess talking about the hearing on August 6, 1975. You told us that you did not or that you were not aware that [trial counsel] was not going to be there until half hour after the hearing was supposed to have started, then you found out?

A. Roughly a half hour.

Q. Again, could you speak up so that we can all hear?

A. Roughly a half hour.

Q. All right. And, this was the only time you ever met Mr. Hornstein from the Public Defender's office?

A. Yes.

Q. All right. After the August 6, 1975 hearing, when was the next time that you recall seeing [trial counsel]?

A. September the 4th, I believe it was the day of that sentencing hearing on the – of September.

Q. Again, will you speak up?

A. The date of the sentencing hearing on September 4th, I believe it was, the first part of September.

Q. All right. That's the date the State presented the aggravating circumstances evidence?

A. Yes.

Q. And, that was the first time you seen [trial counsel] since the end of your trial?

A. Yes.

Q. Did he communicate with you by letter or by telephone during that time?

A. I know I talked to him two or three times on the phone for the entire period, but I don't know exactly when it was. I know, once he sent a letter up here asking specifically for a phone call to Thornton, specifically at a certain time that I should call.

Q. But other than – did you call him?

A. Yes.

Q. And, what did you talk about in that conversation?

A. The only thing he seemed concerned with at that time was, there was a point in the presentence investigation and he wanted to know where my ex-girlfriend was.

Q. He wanted to know where your ex-girlfriend was?

A. Yes.

Q. All right. I assume to interview her for your presentation of evidence on the sentencing?

A. Yes.

Q. Was anything else discussed in that phone call?

A. I believe something about Monseiger,[11] but I can't say for sure.

Q. Okay. We'll ask you about Mr. Monseiger in a minute. At any time before the September 4, 1975 hearing, did [trial counsel] ever discuss with you [what] the aggravating circumstances under the State statutes were?

A. No.

Q. Did he ever discuss with you what evidence the State was going to present to show aggravating circumstances? You will have to speak up.

A. No.

Q. Did he ever discuss with you what the mitigating circumstances – first of all, the mitigating circumstances were under the statute?

A. No.

Q. Regarding the September 4, 1975 hearing, did he at any time prior to that hearing ask you what happened at the August 6, 1975 hearing.

A. No.

Q. And, the August 6th hearing was when the ground rules for the August 6th sentencing were laid out by the Court?

A. Yes.

Q. Do you know of your own knowledge, did he ever talk to Mr. Hornstein to find out what they were about?

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[11] This apparently was the federal probation officer discussed earlier.

A. No, I don't know.

Q. So, as far as you know, you have no personal knowledge that he ever visited with Mr. Hornstein to discuss the August 6th hearing?

A. No.

Q. All right. Now, at the – before the hearing on your sentencing, did [trial counsel] ask if you would prepare some type of a biography of yourself to assist him in preparing mitigating circumstances?

A. No.

Q. Did – do you recall that there was a presentence investigation report on you by the adult probation officer?

A. I remember talking to someone from there.

Q. Did you ever see the report that they did?

A. No.

Q. Prior to either the hearing on September the 4th, 1975 or the hearing on September 30th, 1975 when you were to present your mitigating circumstances, did [trial counsel] ever go over the presentence investigation report with you?

A. There was only that one comment on the phone about where my ex-girlfriend was in connection with that, because it was mentioned in there.

Q. All right. Are you aware that there was a recommendation made in the presentence investigation report in your case?

A. I know there was one, but [trial counsel] didn't tell me that.

Q. I know, but a recommendation on the sentencing?

A. I know there is one.

Q. When did you first find out that there was a recommendation on the sentencing contained in the presentence investigation report?

A. When you and Mr. Sigler were down in April or May, I think, I believe it was, you told me about it.

Q. In May of 1978?

A. Yes.

Q. Almost three years after the sentencing hearing?

A. Yes.

Q. And, the recommendation was for the incarceration?

A. Yes.

Q. But, [trial counsel] never told you that?

A. No.

Q. Did he ever argue that to the Court at the sentencing hearing?

A. No.

Q. Let me ask you this before I forget: The trial that you had on July 21st, 1975, is that the only jury trial you have ever had?

A. The first one.

Q. All right. When [trial counsel] was appointed to represent you on the sentencing, did he live in Omaha, Nebraska at that time?

A. Yes.

Q. All right. During the time that you were being – going through the sentencing procedure, did he change addresses? What I'm getting at is did he change and move out of the state?

A. I think he moved out about the time of my trial.

Q. Where did he move to?

A. Sioux Falls.

Q. Sioux Falls, South Dakota?

A. Yes.

Q. All right. After your trial, you were present yesterday when he testified, were you not?

A. Yes.

Q. He said that after the jury came in in your trial, he went back to Sioux Falls, South Dakota?

A. Yes.

Q. So, while he was representing you on the sentencing hearing in this case, he resided in another state and in another city?

A. Yes.

Q. Contacted you, the one time that you recall, by phone?

A. Yes.

Q. But, other than that you don't recall any contact with him?

A. I believe at the most there may have been two – three phone calls, at the most. One of

them was initiated by him and the others were by me.

Q. The one that he initiated, is that the one you have told us about?

A. Yes. He sent a letter down to Thornton down here, and asked Thornton – had Thornton see that I call him at a specific time.

Q. All right. And, the two phone calls that you remember making to [trial counsel], where did you have to telephone to get ahold of him?

A. What do you mean?

Q. Where did you call?

A. His office up in South Dakota.

Q. All right. Any, do you recall the purpose of those phone calls to [trial counsel]?

A. Wanted to know how he was coming along, and finding out the stuff he was going to present.

MR. PANE: I can't hear.

A. I wanted to know how he was coming along on finding stuff to present at the hearing.

Q. And, what did [trial counsel] respond?

A. That he was still locating material and stuff like that.

Q. Did he tell you what material he was locating?

A. No, he did mention talking to some penitentiary officials and some state's attorney and former attorneys.

(BOE, Exhibit 13, TR 343:16-352:12).

A review of trial counsel's testimony at the state postconviction hearing reveals no substantial contradiction of Rust's testimony that trial counsel failed to discuss sentencing strategy with Rust (BOE, Exhibit 12, TR 103-208).[12] Indeed, a review of trial counsel's files reflects not one item of correspondence to Rust about sentencing during the pertinent time frame (Exhibits 17 and 18). Nor do trial counsel's files reveal even one note trial counsel made of the substance of any telephone conversations with Rust during the pertinent time frame (Exhibits 17 and 18).[13]

Furthermore, a review of trial counsel's affidavit in support of his request for attorney's fees[14] strongly supports

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[12] It would not be a fair characterization of the record to conclude that trial counsel lacked a strategy at the sentencing proceeding. Trial counsel endeavored to convince the sentencing panel that due to Rust's traumatic childhood, Rust's actions, while they should not be condoned, did not justify the death penalty (BOE, Exhibit 19). For example, trial counsel presented the testimony of Rust's mother, Frances Rust, and Robert Schroeder, a family friend who had known Rust all his life. The picture which emerged from their testimony did, indeed, establish that Rust's childhood was traumatic. Rust lost the sight in one eye and was viciously tormented by other children. Moreover, on the same day Rust's grandmother died, his father suffered a heart attack and his younger brother was killed by an automobile while Rust looked on. Rust's father later died. Rust was said to have blamed himself for the deaths of his father and younger brother.

[13] During the state postconviction proceedings, trial counsel said he thought some of his notes were missing from the files, but he had no explanation as to why the notes were missing (Exhibit 12, TR 110:11-112:1).

[14] Trial counsel left the Douglas County, Nebraska, Public Defender's office for private practice in South Dakota about August 15, 1975, and was appointed as special counsel to represent Rust at the sentencing hearings (Exhibit 55, Motion for Appointment of Counsel and Order of Appointment).

Rust's testimony. For example, the affidavit (Exhibit 55, Affidavit in Support of Attorney Fees and Expenses) details that trial counsel had two conferences with Rust prior to the commencement of the sentencing proceedings on September 4, 1975, when the State presented evidence of aggravating circumstances. These conferences lasted approximately one hour and were apparently telephone conferences initiated by Rust.[15]

On September 4, 1975, the date of the first sentencing proceeding, trial counsel represented in his claim for fees that he conferred with Rust for one hour. Between September 5, 1975, and September 30, 1975, when trial counsel presented mitigating evidence and argued the matter, trial counsel billed for: a fifteen-minute conference on

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[15] Trial counsel billed for long distance telephone calls. But in his claim he never billed for any calls to Rust. Counsel also billed for mileage. There are four entries for mileage. Three of the entries for mileage reflect travel on the dates of the three substantive sentencing proceedings. These were billed at 360 miles each. According to the **Rand McNally Road Atlas** 58 (68th ed. 1992), the round-trip mileage from Sioux Falls, South Dakota, to Omaha Nebraska, is about 366 miles. It appears, therefore, that the travel was from counsel's home in Sioux Falls, South Dakota, to Omaha, Nebraska. The other mileage is for unspecified investigation, and is stated as 167 miles. Since Rust was always in Omaha, Nebraska, or in the Nebraska penal complex in Lincoln, Nebraska, it is evident that trial counsel could never have personally visited with Rust unless he did so on the dates of the three substantive sentencing proceedings. Moreover, since trial counsel billed for his telephone calls, it appears that any "conference" with Rust, except those on the dates of the sentencing hearings, would have been as a result of telephone calls placed to trial counsel by Rust.

September 8, 1975; a fifteen-minute conference on September 17, 1975; correspondence to Rust taking thirty minutes on September 18, 1975; correspondence to Rust without specifying the time devoted on September 20, 1975; a conference with Rust for forty-five minutes on September 22, 1975; and a conference with Rust for thirty minutes on September 26, 1975.[16] On September 30, 1975, the date trial counsel presented mitigating evidence and argued the case, counsel billed for a thirty-minute conference with Rust.

It thus appears that: (a) trial counsel never conferred with Rust in person, except on the dates of the sentencing hearings and then for a total of one hour and thirty minutes; (b) before the presentation of the evidence concerning aggravating circumstances, trial counsel spent about an hour conferring with Rust over the phone during two calls initiated by Rust; (c) after the presentation of the evidence concerning aggravating circumstances, but before the presentation of the evidence concerning mitigating circumstances, trial counsel conferred with Rust over the telephone during calls initiated by Rust a total of four times for a total of one hour and forty-five minutes; (d) trial counsel twice sent correspondence to Rust between the dates of the first and second hearings which took counsel about thirty minutes of time, although, as indicated previously, copies of the correspondence cannot be located in counsel's files.

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[16] For the reasons expressed in the preceding footnote, all of these "conferences" would have had to have been by telephone calls which were initiated by Rust.

The response of the State is, to be blunt, insufficient. The State merely contends that Rust "cites no facts to support this allegation [failure to discuss a sentencing strategy with defendant] or to show prejudice." (Exhibit 7, Brief of Appellee at 18).

With this evidence in mind, I turn then to the question of whether Rust's trial counsel breached the appropriate standard of care. As Rust's counsel pointed out to the Nebraska Supreme Court, "it is incredible, but apparently true, that with John Rust's life on the line, his attorney failed to sit down with him even one time to develop what their evidence would be at the sentencing hearings." (Exhibit 35, Brief of Appellant at 58).

The United States Supreme Court recognized in **Strickland** that defense counsel have certain basic duties which include consultation with their clients on important decisions:

> Representation of a criminal defendant entails certain basic duties. . . . [f]rom counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

Strickland, 466 U.S. at 688. **Cf. Otey v. Grammer,** 859 F.2d 575, 578 (8th Cir. 1988) (stating, "[P]rior to trial and sentencing, counsel informed Otey of his strategy and of the evidence and witnesses that would be presented. In these circumstances, we cannot say either that counsel was deficient or that Otey was prejudiced by the lack of more extensive discussions with counsel. **See, e.g., Easter**

v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980)."), **cert. denied,** 110 S. Ct. 3288 (1990).

I find as a matter of fact, and conclude as a matter of law, that trial counsel failed to consult with Rust in any meaningful sense on the critical strategic decision of how to deal with the manner in which Michael Kellogg was killed. This failure breached the applicable standard of care. I turn next to the manner in which this failure prejudiced Rust.

Claims 12B(35), 12B(36), and 12B(37) allege the failure of trial counsel to present evidence and argue that Kellogg was not killed as he lay helpless on the ground, but rather was killed in a nearly instantaneous exchange of gunfire where Kellogg, not Rust, was the aggressor. Without question, trial counsel made an extremely important decision on how to deal with this question. In essence, trial counsel elected to describe the manner in which Kellogg was killed as "not relevant" and to stress that Rust's tortured childhood should exempt him from the death penalty. This was a perilous strategy. It was a strategy in which Rust played no part, and which resulted in imposition of the death penalty.

The facts of Kellogg's death are discussed extensively in the magistrate judge's previous report and recommendation which I adopted (Exhibit 55, at 70-96). I shall recount those facts only briefly here.

With Kellogg dead, Rust was apparently the only witness to observe the entirety of the shooting incident between himself and Kellogg. A police officer also observed part, but not all, of the incident. The evidence indicated the victim was a "volunteer" private citizen

who armed himself and, without a request from police, pursued Rust and fired at least two shots at Rust as Rust tried to jump a fence. The only evidence of the shooting incident on which the sentencing panel had to rely was the trial transcript testimony of the police officer who witnessed part of the incident. Rust did not testify at the sentencing hearing. The police officer who testified at trial was not recalled as a witness during the sentencing proceeding.

The record is **undisputed** that as Rust ran away from Sharon Street the exchange of gunfire between police and the robbers had ceased, and Rust was not shooting at Kellogg. The record is **undisputed** that Kellogg began shooting at Rust as he ran away from Kellogg after Kellogg yelled at him to stop. The record is **undisputed** that Kellogg fired at least two shots at Rust, and perhaps as many as three, before Rust returned the fire. The record is **undisputed** that Kellogg was a private citizen who was not asked to aid police in any way.

Moreover, the record does not support the conclusion that Rust shot Kellogg as Kellogg lay helpless on the ground. Rather, if Rust shot Kellogg, Kellogg died in a virtually instantaneous gun battle.[17] The police officer

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[17] As the magistrate judge pointed out (Exhibit 55, at 93 n.20), the police officer made it clear during a subsequent postconviction hearing that at no time did Rust ever stand over Kellogg and shoot down at him. Rather, Kellogg was shot from about forty feet away and subsequent shots were discharged when Kellogg had not quite hit the ground. Moreover, as trial counsel admitted at the state postconviction proceedings, police reports indicated that Kellogg was found with a cocked weapon in his hand. (Exhibit 12, TR 144:520).

had little more than "a second" to observe what happened. The transcript of trial upon which the sentencing panel was forced to rely because trial counsel failed to call the officer as a witness indicates that the police officer said a number of things about the manner in which Kellogg was killed.

At one point, the police officer said Kellogg was shot again "when he first started to fall." At another point, the police officer said he saw Kellogg shot "as he went down." At another point, the officer responded to the leading question "As he was down?" by saying "Yes, sir."

It was predictable that the prosecutor would argue at sentencing that the police officer "**saw Mr. Kellogg falling to the ground, at which time John Rust fired two more shots into his body and Michael Kellog** [*sic*] **fell over dead.**" (BOE, Exhibit 4, TR 110:12-14 (emphasis added)). It was equally predictable that the sentencing panel, and later the Nebraska Supreme Court, would place significant emphasis upon this scenario unless it was effectively countered.

Indeed, the sentencing panel observed that "[i]nstead of continuing with his escape, the defendant thereafter deliberately fired two more shots at Kellog [*sic*] while he was wounded and lying on the ground." (Exhibit 5, at 4-5). At another point, the court found that Kellogg's murder "was committed by the defendant to conceal the commission of these crimes and to conceal the identity of this defendant." (Exhibit 5, at 4). The Nebraska Supreme Court likewise stated in the direct appeal that Rust "was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust."

State v. Rust, 197 Neb. 528, 533, 250 N.W.2d 867, 871 [hereinafter **Rust I**], **cert. denied**, 434 U.S. 912 (1977).

At the sentencing hearing, Rust's trial counsel devoted nine sentences of oral argument[18] to this critical issue, concluding by telling the sentencing judges that the manner in which Kellogg died was not relevant:

> Mr. Pane talks a great deal about Mr. Kellog [*sic*].
>
> We don't have John Rust going into somebody's house and cold-bloodedly killing them; and cold-bloodedly raping them.
>
> Mr. Kellogg introduced himself into the situation.
>
> And, Mr. Pane also indicated that – at no request from anyone, I believe that's correct.
>
> He came around the corner with his gun blazing, as one of the Officers had indicated.
>
> A trained Officer was standing behind him around the corner.
>
> So, we got Mr. Rust standing in the back yard with somebody shooting at him.
>
> Kill or be killed, I suppose.
>
> However, **I don't think that all is relevant to day** [*sic*].

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[18] The brief submitted to the sentencing panel, which was authored by other members of the Douglas County Public Defender's Office, makes no attempt to rebut the State's claims about how Kellogg was killed (Exhibit 55, Defendant's Brief Opposing Imposition of the Death Penalty (filed Sept. 29, 1975)).

(BOE, Exhibit 4, TR 130:24-131:19 (emphasis added)).

Trial counsel obviously believed the way in which to deal with Kellogg's shooting was to down play it and stress Rust's traumatic childhood instead.[19] Perhaps that was why trial counsel did not make specific reference to the police officer's testimony in oral argument or in a brief in an effort to persuade the panel that the killing was not as described by the State. Perhaps that was also why trial counsel did not call the police officer to clarify that the shooting of Kellogg was not an execution-style killing. That is also probably why trial counsel did not implore Rust to testify himself to set the record straight.[20]

Classifying the manner in which Kellogg died as "irrelevant" was the most critical decision trial counsel would make regarding sentencing. As it turned out, this decision was literally a fatal one for Rust. Had counsel consulted with Rust about this decision and Rust acquiesced, the legal implications might be entirely different. But Rust's trial counsel did not consult with him on this issue and thereby violated one of his "basic duties" to

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[19] Rust's counsel was not experienced with capital cases. He had been out of law school for about five years at the time of trial. (Exhibit 12, TR 103:24-104:14). He had never tried a capital case before. (Exhibit 12, TR 122:1-2).

[20] Given the fact that Rust was not candid with his counsel about how the shooting took place, one could speculate that Rust would have chosen not to testify. However, this is beside the point. Trial counsel had a duty to consult with his client about the important decision of how to deal with the manner in which Kellogg was killed. It was not up to trial counsel to decide for himself what the strategy would be. **Strickland**, 466 U.S. at 688.

Rust, that is, "to consult with the defendant on important decisions." **See Strickland**, 466 U.S. at 688.

Ultimately, I find there is a reasonable probability that, absent this error, the sentencer – including the appellate court – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. **Id.** at 695. In making this determination, I understand that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." **Id.** at 694. It need not, of course, amount to a certainty. I make this finding for the following reasons.

As noted previously, although the sentencing panel did not find that aggravating circumstance "d" (exceptional depravity) existed, they concluded that after Rust shot Kellogg "[i]nstead of continuing with his escape, the defendant thereafter deliberately fired two more shots at Kellog [*sic*] while he was wounded and lying on the ground." (Exhibit 5, at 4-5). This construction of the evidence infects the sentencing panel's findings with regard to aggravating circumstance "b" (concealing the identity of the perpetrator of the crime) ("The court finds that the murder of Michael Kellog [*sic*] was committed by the defendant to conceal the commission of these crimes and to conceal the identity of this defendant."). (Exhibit 5, at 4). This construction of the evidence finds its way into the sentencing panel's findings with regard to aggravating circumstance "f" (great risk of death to at least several persons) ("demonstrated an utter disregard for human life, and a willingness to shoot and kill anyone who got in the way of his escape"). (Exhibit 5, at 6). This construction of the evidence taints the sentencing panel's findings with regard to aggravating circumstance "h" (hinder the

exercise of any governmental function) ("The conduct of the defendant in committing the murder of Michael Kellog [*sic*] was a direct attempt to disrupt and hinder the lawful exercise of a proper governmental function."). (Exhibit 5, at 6). As pointed out previously, the Nebraska Supreme Court relied upon this description of Rust "shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust." **Rust I**, 197 Neb. at 533, 250 N.W.2d at 871.

Given the fact that under Nebraska law aggravating circumstances are required to be found beyond a reasonable doubt, I believe there is the requisite reasonable probability – a probability sufficient to undermine confidence in the outcome – that the sentencer and the appellate court would have concluded that the balance of aggravating and mitigating circumstances did not warrant death absent the error of trial counsel.[21] **See, e.g., State v. Holtan,** Doc. 092, No. 634 (Dist. Court of Douglas County, Neb., Oct. 17, 1989) (Filing 54) (Order of Resentence imposing life imprisonment, especially pages 19-20) (stating, "The panel has reviewed the cases of the persons presently sentenced to death in the State of Nebraska. The crimes for which those defendants received the

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[21] As the magistrate judge previously noted (Filing 55, at 6971), the failure of the Nebraska Supreme Court to specify that the "reasonable doubt" standard applied to aggravating circumstances until after Rust's sentencing undoubtedly made trial counsel's task more difficult. No matter what the vagaries of the law, however, trial counsel was not free to fail to consult with his client about what was literally a life-and-death decision and leave Rust essentially undefended on the charge that he killed Kellogg as Kellogg lay helpless on the ground.

imposition of the death penalty are generally distinguishable from the crime committed by Richard Holtan. In five of the cases, the defendants were convicted of multiple murders, some of which included torture. Of the remainder, two defendants (Michael Ryan, Harold Otey) perpetrated torture upon their victims. Execution-style murders were involved in the crimes perpetrated by C. Michael Anderson and Peter Hochstein. The murder perpetrated by Clarence Victor was atrocious for the beating of an unusually vulnerable victim upon whom it was perpetrated, as well as his previous homicide convictions. The murder perpetrated by Charles Palmer was outrageous for the pain and injury gratuitously inflicted on the victim.").

In summary, I find as a matter of fact, and conclude as a matter of law, that Rust's claims of error in 12B (11), (12), (35), (36), and (37), when considered together, establish ineffective assistance of counsel at sentencing sufficient to establish a reasonable probability that, absent the errors, the sentencer-including an appellate court – would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Accordingly, judgment should be entered in favor of the petitioner, and against the respondent, providing that Rust's sentence shall be reduced to life imprisonment, unless within sixty (60) days after the judgment becomes final the State of Nebraska initiates capital resentencing proceedings.

(3) Appellate Error

With regard to his direct appeal, Rust argues that his appellate counsel failed to raise two critical issues[22] and that as a result of the failure to raise those issues, Rust received ineffective assistance of counsel in his direct appeal.

First, Rust argues that his appellate counsel failed to raise the issue of whether or not the felony of robbery, underlying the charge of felony murder, had terminated prior to the time Kellogg was shot. It is true that appellate counsel did not raise this issue in the original brief to the Supreme Court. However, in Rust's first state postconviction action this matter was argued, submitted, decided against Rust on the merits, and affirmed by the Nebraska Supreme Court. **Rust II**, 208 Neb. at 323-25, 303 N.W.2d at 493-94. Moreover, the matter was argued again in Rust's second postconviction action in state court, and the court specifically found:

> Lest there be any doubt as to the [prior Supreme] Court's finding, however, the evidence adduced at trial clearly establishes that, although the actual robbery of the Hinky Dinky store itself was completed, the automobile chase of the defendants by police, and the ensuing shootout which resulted in the victim's death, were so closely related in time and place as to preclude a finding that the underlying felony had terminated. The failure of counsel to raise

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[22] Initially, Rust argued that appellate counsel failed to raise three critical issues. The third issue, claim 12B(3), however, has been withdrawn. (Filings 68 and 69).

> this issue on direct appeal thus does not constitute ineffective assistance.

Exhibit 46, Memorandum and Order at 13. **See also Rust III**, 223 Neb. at 157, 388 N.W.2d at 491. Thus, even if it was error to fail to raise this issue on direct appeal, Rust suffered no prejudice.

Second, Rust argues that this appellate counsel was ineffective because counsel failed to raise the issue of ineffective assistance of trial counsel. Once again, although this allegation may be true as a matter of fact, Rust was permitted to raise the issue of ineffective assistance of counsel in both his first and second postconviction proceedings, and he received a decision on the merits. **Rust II**, 208 Neb. at 323-26, 303 N.W.2d at 493-94; **Rust III**, 223 Neb. at 155-57, 388 N.W.2d at 489-91. Therefore, Rust suffered no prejudice.

II. Fair and Impartial Jury – Claims 12C and 12J

Claims 12C(1) and 12C(2) relate to Rust's argument that he was denied a fair and impartial jury. Claim 12C(1) alleges that the trial judge improperly excused a prospective juror for cause because she expressed some concern about the death penalty. Claim 12C(2) alleges there was juror misconduct at the trial. Related to claim 12C(2) is claim 12J, which alleges that Rust's rights were violated when the trial judge, who also presided at the supplemental state postconviction proceeding, refused to disqualify himself over the issue of juror misconduct. I shall consider each of these arguments in turn.

A. Exclusion of Juror

It became apparent during **voir dire** that one of the prospective jurors, Miss Lee, had read a newspaper account of the events in the case, had watched other accounts on television, and had seen the funeral procession for Kellogg. This caused Miss Lee to answer "I don't know" in response to the court's inquiry: "You don't think that you could be fair to these defendants as a result of what you read?" (Exhibit 2(a), TR 321:6-9). After receiving the "I-don't-know" answer, the trial court inquired, "Do you think you might be influenced by what you read and what you saw?" (Exhibit 2(a), TR 321:10-12). Miss Lee answered "yes." (Exhibit 2(a), TR 321:13). Without a motion from either the prosecution or the defense, the trial judge excused the prospective juror, without objection by either side.

The colloquy between the trial judge and the prospective juror was as follows:

> THE COURT: Miss Lee, you have been selected as a prospective Juror in a case brought by the State of Nebraska against John Rust and Ronald Ell, they are charged with Murder and several counts of shooting with Intent to Kill, Wound or Maim.
>
> The Information that the State has filed alleges, and it is only an allegation and not proof, that on or about February the 21st of this year, the Hinky Dinky Store out on 30th and Weber Street was help [*sic*] up; Police were called and a chase ensued and at 25th and Iowa Street shots were exchanged and after the shooting there was a civilian by the name of Kellog [*sic*], who worked for the City Public Works

Department, was dead; and that is also one of the allegations that has been filed against these defendants.

Do you remember reading something about this case?

Do you think you read something about it or heard something about it on television?

MISS LEE: I remember when it happened because I was – it must have been on a Saturday because I was driving home and there was this long procession – a funeral procession; and, there was a lot of Police cars and I thought it was a Police killing.

And, when I got home – and then I realized it had been this killing because I saw them present something to the mother – it was some kind of a plaque or something because he had helped an Officer.

THE COURT: Miss Lee, you have been selected as a prospective Juror to hear the criminal charges that were brought against the men that the State alleges caused the death of this individual.

Do you think that by what you read in the newspaper and what you saw on t.v. and the fact that you went by the funeral procession, that you might have formed an opinion as to their innocence or their guilt of these two defendants?

MISS LEE: Well, the thing – it wasn't just really what happened that affected me. It was – I normally don't read – but there was an account of it in the World Herald and I wasn't aware of some of the legal aspects of the trial.

> I mean, they just didn't – they printed more or less everything in detail and of course probably what affected me was – they said something about the fact that Nebraska had reinstated its criminal punishment, the death penalty and things of that type that bothered me.
>
> THE COURT: Did it bother you?
>
> MISS LEE: Yes.
>
> THE COURT: You don't think that you could be fair to these defendants as a result of what you read?
>
> MISS LEE: I don't know.
>
> THE COURT: Do you think you might be influenced by what you read and what you saw?
>
> MISS LEE: Yes.
>
> THE COURT: All right. I will excuse you.

(Exhibit 2(a), TR 318:21-321:15).

The trial judge did not contemporaneously explain his reasons for excusing the prospective juror. Later, in a memorandum and order issued as a result of a postconviction proceeding in state court, the trial judge indicated he had excused Miss Lee "for cause because of her views on the death penalty" (Exhibit 46, Memorandum and Order ¶ 16, at 7).

Rust argues that it was error of constitutional significance to exclude Miss Lee, **see Witherspoon v. Illinois,** 391 U.S. 510, 522 (1968) (stating it was constitutional error

to exclude prospective jurors simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction). In **Wainwright v. Witt**, 469 U.S. 412 (1985), the Supreme Court held that the question of a challenge to a prospective juror for bias is a "factual issue" subject to the provisions of 28 U.S.C. § 2254(d), which requires a federal reviewing court to accord any finding of the state courts on "factual issues" a "presumption of correctness." **Id.** at 426-30. The Court stated that this rule applies to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause.

There is no basis upon which to overturn the state judge's finding in this case. I note especially that the prospective juror stated she did not know whether, as a result of what she had read, she could "be fair to these defendants." Under the circumstances, I do not believe Rust has overcome the "presumption of correctness," particularly when, in light of the fact that the prospective juror had personally witnessed the victim's funeral procession and been exposed to media coverage of the events, it appears the trial judge was concerned not for the State, but for Rust.

B. Juror Misconduct

Rust claims a prospective juror, Mr. Corcoran, engaged in misconduct for the following reasons: (a) he did not disclose the fact that he had attended one year of law school with Rust's codefendant's trial counsel, and

(b) he endeavored to sway the jury in favor of Rust's codefendant.[23]

An extensive discussion of the facts is not necessary.[24] As the Nebraska Supreme Court observed, even if one accepts Rust's view of the facts, "the only thing that has been established is that Corcoran sought to help Ell's cause." **Rust III**, 223 Neb. at 158, 388 N.W.2d at 491. But Rust argues that the very effort to help Ell necessarily injured Rust. This argument misses the point for two reasons.

First, it is a fair characterization of the trial record to suggest that the evidence against Rust, including an eyewitness account of at least part of Kellogg's shooting, was overwhelming. **Id.** at 159, 388 N.W.2d at 491-92. The trial evidence indicated that after the automobile in which Rust and Ell were fleeing became stuck in a snow bank, Ell and Rust left on foot. Ell hid in some bushes and surrendered when ordered to do so. Rust, on the other hand, was involved in the shootout with Kellogg. **Id.** As a consequence, there is a clear and obvious distinction in the trial record between the conduct of Ell and Rust which justified the difference in their treatment by the jury, particularly given the overwhelming evidence against Rust.

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[23] There is some suggestion in the record that this juror may also have spoken with Rust's trial counsel during trial of this case. This is not assigned as error. In any event, it appears from the record that if any conversation took place, it was a passing remark in a hallway.

[24] The testimony of the principal witnesses on this issue may be found in Exhibit 43(a).

Second, it is undisputed in the postconviction record that the jury found Rust guilty after only one vote. (Exhibit 43(a), TR 137:13-19; 139:4-10). There is simply no evidence in the record upon which to base an inference that Corcoran was trying to help Ell's counsel and in so doing harmed Rust. While it does not take much imagination to construct a scenario where a juror endeavoring to help one defendant might harm another, there is no basis in fact for such a scenario in this case.

Moreover, the state trial judge also conducted the postconviction proceeding. At the postconviction proceeding, the juror who allegedly acted improperly was extensively examined. Among other things, the state trial judge found that "the defendant has failed to establish any harm or prejudice to his cause, **even assuming that the alleged misconduct did occur."** (Exhibit 46, at 18 (emphasis added)). As indicated above, the Nebraska Supreme Court reached the same conclusion. I believe the presumption of correctness set forth in 28 U.S.C. § 2254(d) must apply and Rust has failed to overcome that presumption as a matter of fact. **See Rushen v. Spain,** 464 U.S. 114, 120 (1983) (stating the substance of an **ex parte** communication and its effect on juror impartiality are questions of historical fact, and under 28 U.S.C. § 2254(d) the state court's findings thereon are entitled to a presumption of correctness and must be deferred to by the federal court in the absence of " 'convincing evidence' " to the contrary).

C. Failure to Recuse

In claim 12J Rust argues that he was denied his constitutional rights when the state trial judge, who also presided at the second postconviction hearing, refused to disqualify himself.

Rust argues that he was denied his constitutional rights when the state trial judge refused to disqualify himself when the judge's court reporter was called to testify regarding claim 12C(2). The reporter testified about an interview she conducted of Corcoran in preparation for a book she was writing. Rust argues that the trial judge's impartiality was suspect as he was required to pass upon the credibility of the court reporter who served the court over which he presided, and the trial judge also relied upon his own memory as to what the court reporter said about Corcoran's contact with another. Further, Rust argues that because the state trial judge commented that he would have withheld permission for the court reporter to write a book concerning the case had he known the court reporter had agreed to provide information to Rust, the judge should have recused himself and his failure to recuse himself requires a remand for a new hearing or other relief. **See Tyler v. Swenson,** 427 F.2d 412, 415 (8th Cir. 1970) (where the state judge relied upon his own recollection in denying relief, the petitioner was entitled to an evidentiary hearing before an impartial judge). I disagree for many of the same reasons enunciated by the Nebraska Supreme Court. **Rust III,** 223 Neb. at 168, 388 N.W.2d at 497. In **Rust III**, the Nebraska Supreme Court stated that it did not matter whether the trial judge abused his discretion in failing to disqualify himself because if the trial judge did so err, the error did

not prejudice Rust. The court reached this conclusion because it found that the alleged juror misconduct, **even if true,** did not prejudice Rust. **Id.** For the reasons expressed in paragraph B above, I agree. Therefore, I further agree that even if the trial judge should have recused himself under the principles outlined in **Tyler,** such error did not prejudice Rust since, even assuming the truth of the court reporter's testimony, Rust suffered no prejudice as a result of juror misconduct.

III. General Trial Error – Claim 12D

Rust asserts what he calls "general trial error," claiming that such error violated his constitutional rights in that the prosecution commented on his failure to testify.[25]

The respondent argues that claim 12D(l) – prosecutor's alleged improper comment on Rust's failure to testify – is not exhausted. I disagree as I believe the matter was presented to the trial judge and the Nebraska Supreme Court in the state postconviction proceeding. (Exhibit 32, Petitioner's Amended Motion to Vacate and Set Aside ¶ 3; Exhibit 35, Brief of Appellant at 8 & 90). The matter was also presented to the Nebraska Supreme Court on direct appeal. (Exhibit 6, Brief of Appellant at 81).

Rust complains about the argument of one of the prosecutors at the close of the case. The prosecutor was

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[25] Claim 12D(2)(a)-(d) has been withdrawn. (Filings 68 and 69).

discussing with the jury the manner in which Kellogg died. The prosecutor argued:

> And, the fact that I might feel that while the act may have been foolhardy, it was very courageous. That has nothing to do with this case whatsoever. But, I do feel the fact that the argument is made is probably the classic irony of this entire case. The fact that these two Defendants, who would assert each and every constitutional right that our system of government affords them, this right, that we are all here for today. The right to a trial by Jury, by 12 fair and impartial people. They would assert each and every right at each and every stage of the proceedings, and they'd be the first to scream that those rights were in any violated [*sic*]. Yet, these two men, John Edward Rust and Ronald Ell will not in any way accept any of the responsibility, any of the duties that those rights also entail, and would say –

(Exhibit 3(b), TR 534:2-15).

Rust argues that the prosecutor's remarks were a comment on Rust's failure to testify. As a matter of fact, I conclude that the prosecutor's remarks were not a comment on Rust's failure to testify and that the jury could not reasonably have interpreted them as such.

IV. Sentencing Error – Claim 12E

Rust raises two arguments with regard to this claim.[26] First, Rust argues that the sentencing panel improperly received his juvenile record into evidence.

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[26] Initially, Rust raised three arguments with regard to this claim. Claim 12E(2)(a)-(d), however, has been withdrawn. (Filings 68 and 69).

Second, Rust argues that the sentence handed down by the sentencing panel was unconstitutional because he was given a death sentence whereas his codefendant received only a life sentence. I conclude that these claims are without merit.

A. Juvenile Record

The sentencing panel told Rust's counsel it would not consider Rust's "juvenile" record. (Exhibit 4, TR 6:9-7:25; 8:3-4; 29:220). Notwithstanding this ruling, it appears the sentencing court did consider Rust's conviction in the United States District Court for the District of South Dakota for unlawful possession of a firearm, for which he was sentenced to two years' probation on October 3, 1969 (Exhibit 5, at 3 and 7). It appears that Rust was charged and convicted of this crime when he was eighteen, and he apparently was then sentenced pursuant to the now-repealed Federal Youth Corrections Act, ch. 1115, U.S.C.S. 1070-84 (1950) (then codified as 18 U.S.C. §§ 5005-5024).

The Federal Youth Corrections Act conviction was referred to by the sentencing panel explicitly only once, in a discussion of aggravating circumstance "a." Thereafter, the sentencing panel referred to Rust's criminal history in discussing mitigating circumstance "a" and implicitly referred then in part to Rust's Federal Youth Corrections Act conviction in the context of a general discussion of Rust's criminal history. I find that there was no prejudice arising by virtue of the sentencing panel's erroneous consideration of Rust's conviction under the Federal Youth Corrections Act.

With regard to aggravating circumstance "a" – previous conviction for murder or crime of violence or the offender has a substantial history of serious assaultive or terrorizing criminal activity – which the sentencing panel found to exist with regard to a crime of violence, the Nebraska Supreme Court construed the sentencing panel's decision to have been based on a South Dakota conviction for assault with intent to do great bodily harm when Rust was an adult. **Rust III,** 223 Neb. at 165, 388 N.W.2d at 495; **Rust I,** 197 Neb. at 535, 250 N.W.2d at 872. This is a fair reading of the sentencing panel's written order (Exhibit 5, at 3-4). The subsequent recitation of Rust's criminal history, after an in-depth discussion of the conviction for assault with intent to do great bodily injury, can only be construed as an effort by the sentencing panel to describe the criminal history not relied upon by the panel in finding aggravating circumstance "a." Indeed, after reciting Rust's history, the panel stated: "We do not regard this total criminal record as constituting a substantial history of serious assaultive or terrorizing criminal activity within the meaning of the statutory definition." (Exhibit 5, at 4). Accordingly, there was no prejudice to Rust insofar as aggravating circumstance "a" was concerned.

Moreover, as to mitigating circumstance "a" – the offender has no significant history of prior criminal activity – the sentencing panel concluded that Rust's criminal history constituted a significant history of prior criminal activity, thereby precluding the finding of this mitigating circumstance. (Exhibit 5, at 7). Rust conceded in the Nebraska courts that he had been convicted of assault and grand larceny in South Dakota as an adult and that

those convictions were properly admitted before the sentencing panel. Thus, I find, as did the Nebraska Supreme Court, **Rust III**, 223 Neb. at 165, 388 N.W.2d at 495, that the erroneous consideration of his conviction pursuant to the Federal Youth Corrections Act did not prejudice Rust because the adult assault conviction would have been enough to deny Rust that mitigating circumstance.[27]

B. Disproportionate Sentence

Rust argues that the sentencing panel constitutionally erred when it sentenced him to death and his codefendant only to life imprisonment. Rust points out that his codefendant later confessed that he, not Rust, did the actual killing. I shall discuss this issue further with regard to claim 12G, but I emphasize that the sentencing panel certainly could not be held to have erred in this regard. The panel was not aware of Ell's testimony at the time of Rust's sentencing since Ell testified subsequent to the decision of the sentencing panel. As indicated above, Rust had instructed his trial counsel not to shift the blame to anyone else and Rust continually told his trial counsel that he just happened to be in the neighborhood during the shooting, never once mentioning that Ell was the killer. From the evidence available to the sentencing

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[27] Subsequent to imposition of Rust's death sentence, the Nebraska Supreme Court held that "[t]he language of the statute does not require past criminal acts to be violent or even that convictions result to prevent a finding of [mitigating] circumstance (2)(a). Any history of violent criminal behavior would likely be counted in aggravating circumstance (2)(a) if a conviction resulted." **State v. Reeves**, 239 Neb. 419, 433, 476 N.W.2d 829, 840 (1991).

panel, Rust killed Kellogg while Ell hid in the bushes. From this perspective, Rust's death sentence was not disproportionate to Ell's life sentence.

V. Felony Murder – Claim 12F

Rust contends that Neb. Rev. Stat § 28-401 (Supp. 1973) is unconstitutional because it allowed him to be charged, convicted, and sentenced to death for a killing committed without premeditation, deliberation, or intent to kill.

A.

As to the facial challenge to the statute, given **Enmund v. Florida,** 458 U.S. 782, 798 (1982) (stating in the absence of proof that a defendant killed or attempted to kill during a robbery, and regardless of whether defendant intended or contemplated that life would be taken, imposition of the death penalty violated the Eighth Amendment), and **Tison v. Arizona,** 481 U.S. 137, 158 (1987) (stating the Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference), the statute was not unconstitutional.

The Supreme Court in Enmund noted that Nebraska mitigating factor "e" – being an accomplice in the crime committed by another with relatively minor participation – "reduce[d] the likelihood that a person will be executed for vicarious felony murder," **Enmund**, 458 U.S. at 792. Furthermore, the Court recognized that in Nebraska (and

eight other states) "a nontriggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself." **Id.** at 792 & n.12. The Court thus apparently approved of Nebraska's death penalty statute at least insofar as felony murder is concerned. **See id.** at 791-92 & n.12. Since the sentencing panel in this case applied the aggravating and mitigating circumstance approach apparently approved by **Enmund,** Rust's facial challenge to the statute must fail.

B.

Rust is really complaining about the failure to give a lesser-included-offense instruction. Although it is not clear that this issue was fairly presented to the Nebraska Supreme Court, as opposed to the issue of the facial sufficiency of the felony murder statute, I shall address it inasmuch as the respondent does not argue lack of exhaustion or lack of fair presentment.[28]

Rust makes no claim that he requested a lesser-included-offense instruction. Even so he now argues that he was constitutionally entitled to a lesser-included-offense instruction under the principles of **Beck v. Alabama,** 447 U.S. 625 (1980).

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[28] Rust's counsel discussed and briefed the lack of a lesser-included-offense instruction before the state postconviction court and the Nebraska Supreme Court. (**E.g.,** Exhibit 47, at 28-29). However, the Nebraska Supreme Court did not explicitly deal with the issue.

In **Beck**, the Supreme Court reviewed an Alabama statute that prevented trial judges from instructing juries on lesser-included offenses of capital murder. **Id.** at 628 & n.2. Relying upon the Due Process Clause of the Fourteenth Amendment, the Court held that Alabama had to submit a "third option" to the jury. In other words, the defendant in **Beck** was entitled to a lesser-included-offense instruction so the jury would not be confronted with the dilemma of either finding the defendant guilty on the capital charge or not guilty of any crime at all, when the evidence supported a lesser-included offense. **Id.** as 638. **See Blair v. Armontrout,** 916 F.2d 1310, 1326 (8th Cir. 1990) (discussing **Beck v. Alabama,** 447 U.S. 625 (1980)).

Whatever the validity of Rust's argument generally, it is clear that his conviction in this case was final in 1977 when the Nebraska Supreme Court rendered its opinion in **Rust I**. The circuit courts which have considered the question of the retroactivity of **Beck** have concluded that **Beck** is not retroactive. **Carriger v. Lewis**, 948 F.2d 588, 595-98 (9th Cir. 1991); **Andrews v. Deland**, 943 F.2d 1162, 1186-88 (10th Cir. 1991), **cert. denied,** 112 S. Ct. 1213 (1992). **See also Skelton v. Whitley,** 950 F.2d 1037, 1045-46 (5th Cir. 1992), **petition for cert. filed,** ___ U.S.L.W. ___ (U.S. Mar. 30, 1992) (No. 91-7784). Accordingly, I find that the principles of **Beck** are not applicable to this case. I do not reach the merits of Rust's claim that he was entitled to – and the state judge was required to give, even in the absence of a request – a lesser-included-offense instruction.

VI. Cruel and Unusual Punishment – Furman Challenges – Claim 12G

Rust argues that the imposition and execution of his death sentence under Nebraska law and practice violate the Eighth and Fourteenth Amendments to the United Constitution. Essentially, Rust bases this claim on the following: (1) the sentence imposed is disproportionate to his culpability; (2) the death penalty is administered arbitrarily, capriciously and whimsically in the State of Nebraska; (3) the theoretical justifications underlying the imposition of the death penalty are groundless and irrational; (4) the death penalty in and of itself involves pain, suffering and psychological torture and cannot be reconciled with contemporary standards of decency and dignity; and (5) execution by electrocution involves extreme pain and suffering. I find these claims without merit. Each of Rust's asserted grounds is discussed below.

A. Disproportionality to Petitioner's Culpability

Rust argues that the death penalty is disproportionate to Petitioner's culpability because Rust's codefendant, Ronald Ell, confessed to the actual shooting of the victim, Michael Kellogg.[29]

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[29] Rust's conduct surrounding the robbery and shooting incident is crucial to the determination of whether Rust's sentence under the felony murder statute was in fact disproportionate. The Supreme Court considered a felony murder case in which a person sitting by the side of a road in a getaway car during a killing and waiting to help the robbers escape was sentenced to death under a Florida statute. **Enmund**, 458 U.S. at

As discussed earlier, the evidence at trial and at sentencing[30] showed that Rust killed Kellogg. **Rust I**, 197 Neb. at 532-33, 250 N.W.2d at 871; **State v. Ell,** 196 Neb. 800, 802-03, 246 N.W.2d 594, 596 (1976). This court is required to presume as correct the facts relating to Rust's culpability found by the state courts, and the burden

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784-85. The issue presented was "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." **Id.** at 787 (footnote omitted). The Court stressed that the issue was not the appropriateness of the death penalty for murder, but rather for the defendant's own conduct relevant to the incident. **Id.** at 798. Determining that the record did not support a finding that the defendant had killed, attempted to kill or intended to kill, **id.**, the Court held that the defendant could not receive a sentence of death as did the codefendant who did kill, **id.** at 798 & 801.

Subsequently, the Court considered another felony murder case involving defendants who, unlike Enmund, were not simply sitting by the side of the road, but rather who assumed active, major roles by planning and assisting in the robbery, supplying weapons, watching the killings and doing nothing to interfere with the killings. **Tison,** 481 U.S. at 139-41. The Court stated the issue as follows: "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." **Id.** at 152. The Court noted the substantial nature of the defendants' conduct and held that major participation in a felony combined with reckless indifference to human life is sufficient to satisfy the **Enmund** culpability requirement. **Id.** at 158.

[30] The only evidence of the shooting that the sentencing panel had before it was the trial transcript testimony of one police officer who saw only part of the shooting incident. Neither Rust nor Ell testified at the sentencing proceeding, and the police officer who testified at trial was not recalled as a witness during the sentencing proceeding.

required to overcome the presumption is heavy. **Cabana v. Bullock**, 474 U.S. 376, 387-88 (1986) (discussing 28 U.S.C. § 2254), **overruled on other grounds, Pope v. Illinois**, 481 U.S. 497 (1987).

The state trial judge, who presided at the postconviction proceeding, concluded that Ell's testimony and the claim of Rust was "not worthy of belief" (Exhibit 33, at 6). The Nebraska Supreme Court found in regard to this claim that there was a substantial basis for disbelieving Rust and Ell because: (a) neither Ell nor Rust mentioned that Ell was the actual triggerman to their attorneys or to the court until after trial; (b) Ell's testimony was uncorroborated; (c) the trial judge, who had an opportunity to observe Ell at the postconviction hearing, found the testimony unbelievable; (d) a prison guard at the penal complex testified at the postconviction hearing that Rust admitted shooting Kellogg, and (e) the police officer who witnessed part of the shooting and who testified at trial again testified at the postconviction proceeding that Rust killed Kellogg. **Rust II**, 208 Neb. at 322, 303 N.W.2d at 492. Later, in addressing a similar issue, the Nebraska Supreme Court stated that because Ell did not claim that he killed Kellogg until after Ell had been convicted and sentenced and therefore risked nothing by so claiming, any such evidence was not credible. **Rust III**, 223 Neb. at 161, 388 N.W.2d at 493.

Since this court must presume that the findings of the state courts as to Rust's culpability are correct, and since Rust has failed to overcome the presumption that he killed Kellogg, his Eighth Amendment rights have not been offended by imposition of the death penalty.

B. Arbitrary and Capricious Administration of Death Penalty

Rust states that the death penalty is administered and applied in the State of Nebraska arbitrarily, capriciously and whimsically.

First, it appears from Rust's brief that this claim is related in part to the claims brought in section 12H of the petition relating to the alleged vagueness of Nebraska Revised Statute § 29-2523 which sets forth aggravating and mitigating circumstances. Brief of Petitioner at 37-38. Each of the vagueness claims is discussed in regard to claim 12H. Accordingly, since I find that the relevant Nebraska statutes are not vague as applied to Rust, this portion of the claim should be denied as well.

Second, in his brief, Rust cites portions of the state postconviction hearing transcript in support of this claim. Brief of Petitioner at 37. The citations (Exhibit 30, TR 11:3-6; 27:17-29:21; 90:22-92:25) refer my attention to Ell's testimony that Ell, not Rust, shot Kellogg. Ell's testimony evidently then is the factual predicate for the claims asserted by Rust regarding the alleged arbitrary, capricious and whimsical administration of the death penalty. As I have previously found that Rust has not overcome the heavy presumption that the state courts' factual findings on culpability are correct, I likewise conclude that this claim, founded upon the same factual basis, must be denied.

C. Theoretical Justifications

Rust states this claim as follows:

> (3) The theoretical justifications for capital punishment are groundless and irrational in fact; and death is thus an excessive penalty which fails to serve any rational and legitimate societal interests that can justify its unique harshness;
>
> . . . .
>
> (8) Executions set socially sanctioned examples of, and provide an inducement to, violence, and thus do not serve any legitimate state purpose in decreasing the number of homicides. There is no penal purpose served by executions which is not more effectively and more efficiently served by life imprisonment.

(Filing 31).

The Supreme Court has held that "the punishment of death does not invariably violate the Constitution." **Gregg v. Georgia**, 428 U.S. 153, 169 (1976). As part of its analysis, the Court stated that the death penalty was meant to serve two purposes: retribution and deterrence of capital crimes by prospective offenders. The Court acknowledged the presently recognized limitations of retribution, but noted that nevertheless retribution is neither a "forbidden objective" nor "inconsistent with . . . respect for the dignity of men." **Id.** at 183. The Court also recognized the inconsistencies in results obtained from studies relating to the deterrent effect of the death penalty, yet concluded that for many, the death penalty is "undoubtedly" a "significant deterrent." **Id.** at 185-86. The Court concluded that the infliction of the death penalty as a

punishment for murder "is not without justification and thus is not unconstitutionally severe." **Id.** at 187.

In accordance with the views of the Supreme Court, therefore, this court finds that the theoretical justifications underlying imposition of the death penalty for murder have been examined and held to be justifiable as a matter of constitutional law.

D. Standards of Decency

Rust asserts this claim as follows:

> (4) Actual infliction of the death penalty in general and in cases like Petitioner's has, in fact, been repudiated by contemporary standards of decency and dignity;
>
> . . . .
>
> (7) The last death sentence carried out in Nebraska occurred in 1958. No deterrent purpose can possibly be served by the execution of the sentence of death with such infrequency, and the infrequency of such executions demonstrates it is unnecessary as a retributive device. The actions of prosecutors, jurors, governors and courts, in preventing the actual execution of the sentence of death with any regularity in the State of Nebraska and in the United States, demonstrates that the actual execution of the sentence of death is inconsistent with the societal standards of decency.
>
> . . . .
>
> (9) The prolonged periods of uncertainty and delay in the execution of death sentences constitute a psychological torture additional to that

> involved in the sentence of death itself, which is inconsistent with standards of society.

(Filing 31).

The Supreme Court, in assessing contemporary values as they relate to infliction of the death penalty for murder in view of the Eighth Amendment, reviewed the history of the death penalty. The Court concluded that "[d]espite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary sanction." **Id.** at 179. Accordingly, the Court rejected the standards-of-decency argument and held that the death penalty does not invariably constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. **Id.** at 169.

With regard to the frequency with which the death penalty is imposed, the Court has indicated that the relative infrequency of such sentences does not indicate rejection of capital punishment, but rather the feeling that the death sentence should be reserved for a small number of extreme cases. **Id.** at 182.

In accordance with the views expressed by the Supreme Court, this court finds that the imposition of the death penalty in this case does not offend societal standards of decency as a matter of constitutional law.

E. Electrocution

Rust asserts his claim regarding electrocution as follows:

> (5) Execution of a sentence of death by electrocution involves extreme pain and suffering and the maiming of the body of the person executed; (6) Nebraska is one of only a few states which retain execution by electrocution. That method of execution has been rejected by other American states and in all other civilized jurisdictions of the world, as inhumane and inconsistent with standards of decency of society.

(Filing 31).

The Supreme Court has stated that execution of a sentence of death by electrocution does not violate the Fifth or Eighth Amendments to the Constitution. **Francis v. Resweber**, 329 U.S. 459, 464 (1947); **Louisiana ex rel. In re Kemmler,** 136 U.S. 436, 444 & 449 (1890), **overruled on other grounds, Gregg v. Georgia,** 428 U.S. 153 (1976). Therefore, this court denies this portion of Rust's claim.

VII. Death Penalty Statutes – Claim 12H

Rust raises several claims in section 12H of his amended petition. Generally, he argues that the Nebraska death penalty statutes presently codified at Neb. Rev. Stat. § 29-2519, **et seq., (Reissue 1989)**,[31] are vague and overbroad in violation of his Fourteenth Amendment due

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[31] This court shall hereinafter cite to the present codification of the Nebraska death penalty statutes inasmuch as there is no material difference between the statutes as they existed in 1975 and the current codification, insofar as the statutes pertain to this case.

process and equal protection rights. More specifically, Rust's individual claims[32] are summarized as follows:

(1) Claim 12H(1)(a) – the Nebraska death penalty statutes are unconstitutionally vague and overbroad and therefore in violation of the Fourteenth Amendment Due Process Clause to the Constitution[33] in that such statutes do not provide any criteria for invoking a three-judge panel as opposed to one sentencing judge;

(2) Claim 12H(1)(b) – the Nebraska death penalty statutes are unconstitutionally vague and overbroad in violation of the Fourteenth Amendment Due Process Clause in that such statutes do not provide any recognizable criteria for procedures to be followed in the event that a three-judge panel is convened;

(3) Claim 12H(2)(a) – the Nebraska death penalty statutes are in violation of the Fourteenth Amendment Equal Protection Clause to the Constitution in that such statutes do not provide any criteria for invoking a three-judge panel as opposed to one sentencing judge;

(4) Claim 12H(2)(b) – the Nebraska death penalty statutes are in violation of the Fourteenth Amendment Equal Protection Clause in that such statutes do not provide any recognizable criteria for procedures to be followed in the event that a three-judge panel is convened;

(5) Claim 12H(4) – the Nebraska death penalty statutes are in violation of the Fourteenth Amendment Due

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[32] Claim 12H(3) has been withdrawn. (Filings 68 and 69).

[33] Rust claims violations of only the United States Constitution.

Process and Equal Protection Clauses in that such statutes limit the mitigating circumstances that can be presented by a defendant;

(6) Claim 12H(5) – the Nebraska death penalty statutes are in violation of the Fourteenth Amendment Due Process and Equal Protection Clauses because the statutes do not provide for notice to a defendant, which notice should include which aggravating factors the prosecution intends to present and what the evidence in support of such aggravating factors would be;

(7) Claim 12H(6) – the Nebraska death penalty statutes are in violation of Rust's due process and equal protection rights under the Fifth, Eighth, and Fourteenth Amendments because such statutes fail to regulate certain aspects of prosecutorial discretion in capital cases; and

(8) Claim 12H(7) – the following statutes were applied to Rust in violation of his rights under the Fourteenth Amendment Due Process and Equal Protection Clauses:

(a) Neb. Rev. Stat. § 29-2503(1)(a) (Reissue 1975);

(b) Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1975);

(c) Neb. Rev. Stat. § 29-2523(1)(f) (Reissue 1975);

(d) Neb. Rev. Stat. § 29-2523(1)(h) (Reissue 1975); and

(e) Neb. Rev. Stat. § 29-2523(2) (Reissue 1975).

Each of Rust's claims is discussed below.

A. Invocation of a Three-Judge Panel

Rust argues that Neb. Rev. Stat. § 29-2520 violates his Fourteenth Amendment due process and equal protection rights because § 29-2520 is vague and overbroad in allowing for discretion on the part of the trial judge in determining whether a three-judge sentencing panel shall be convened in a capital case. Section 29-2520 has previously been examined by the Nebraska Supreme Court and found not to be unconstitutional. As the Nebraska Supreme Court reasoned, this procedure can hardly be said to be unconstitutional where the United States Supreme Court has approved of statutory schemes allowing that a single judge preside at both trial and sentencing of a capital case. **State v. Reeves,** 234 Neb. 711, 740, 453 N.W.2d 359, 378 (reaffirming the court's holding in **State v. Ryan**, 233 Neb. 74, 125, 444 N.W.2d 610, 643 (1989) (citing **Hildwin v. Florida**, 490 U.S. 638, 640 (1989); **Spaziano v. Florida**, 468 U.S. 447, 463-64 (1984)), **cert. denied**, 111 S. Ct. 216 (1990)), **vacated on other grounds**, 111 S. Ct. 425 (1990); **Ryan**, 233 Neb. at 123-26, 444 N.W.2d at 642-43 (citing **State v. Simants**, 197 Neb. 549, 250 N.W.2d 881, **cert. denied**, 434 U.S. 878 (1977)). Moreover, the Nebraska Supreme Court has reviewed other statutes similar to § 29-2520 and concluded that the sentencing procedures employed in Nebraska are fair and sensitive to defendants in capital cases, satisfy both the Nebraska and United States Constitutions, and ensure that the death penalty will not be imposed arbitrarily or discriminatorily. **Reeves**, 234 Neb. at 740, 453 N.W.2d at 378 (citing **Ryan**, 233 Neb. at 125, 444 N.W.2d at 642-643 (where the **Ryan** court noted: in twenty-nine states a

death sentence may be imposed upon the jury's recommendation; in three states a judge may override the jury's recommendation; in one state a three-judge panel imposes sentence only when the jury cannot agree; and in four states, including Nebraska, a sentencing determination in a capital case is made by a judge or judges without a jury)).

Agreeing with the Nebraska Supreme Court, this court finds that Rust's Fourteenth Amendment due process and equal protection rights were not jeopardized by the implementation of § 29-2520 in this case. Specifically, I recognize that in this case a three-judge panel was convened, which surely did not prejudice Rust since three judges, not one, were required to give thoughtful consideration to whether or not the death penalty should be imposed.

B. Criteria for Three-Judge Panel

Rust argues that his Fourteenth Amendment due process and equal protection rights have been violated because the Nebraska death penalty statutes are vague and overbroad in that they do not provide for any "recognizable criteria" to be applied when a three-judge panel is convened.

For the reasons expressed in the previous subsection of this memorandum opinion, I find that Rust's Fourteenth Amendment due process and equal protection rights are not jeopardized by the implementation of Neb. Rev. Stat. § 29-2519, **et seq**. Specifically, I refer to discussions in **Reeves,** 234 Neb. at 740, 453 N.W.2d at 378 and **Ryan,** 233 Neb. 125, 444 N.W.2d at 642-43, regarding the

comparison of Nebraska's capital sentencing method as compared to that of other states.

C. Limitation of Mitigating Circumstances

The respondent argues that claim 12H(4) – limitation of mitigating circumstances – is not exhausted. I disagree as I believe the matter was presented to the trial judge and the Nebraska Supreme Court in the state postconviction proceeding. (Exhibit 32, Petitioner's Amended Motion to Vacate and Set Aside ¶ 13; Exhibit 35, Brief of Appellant, ¶ IV at 75-78). The trial court specifically addressed the issue in its order on the motion for postconviction relief. (Exhibit 33, Order at 8-11).

Rust argues that the mitigating factors that could be presented by him were limited by both the Nebraska death penalty statutes and express trial court rulings and therefore that his due process and equal protection rights under the Fourteenth Amendment were violated.

Rust relies on, among other cases, two United States Supreme Court cases regarding an Ohio death penalty statutory scheme, **Lockett v. Ohio,** 438 U.S. 586 (1978) and **Bell v. Ohio**, 438 U.S. 637 (1978). Both cases involve an Ohio statute which provided that once a defendant was found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty was to be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determined that at least one of three specified mitigating circumstances had been established by a preponderance of the evidence. **Lockett**, 438 U.S. at 611-12

(Appendix) (setting forth Ohio Rev. Code Ann. § 2929.04(B) (1975)). Stressing the need for individualized sentencing, the Supreme Court concluded that the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." **Id.** at 604 (footnotes omitted). See **Bell**, 438 U.S. at 642. Consequently, the Court found that the Ohio statutory scheme violated a defendant's Eighth and Fourteenth Amendment rights. **Lockett**, 438 U.S. at 608; **Bell**, 438 U.S. at 642.

In **Lockett**, the Court contrasted the Ohio statutory scheme with that of statutes permitting a jury to " 'consider any aggravating or mitigating circumstances,' " Lockett, 438 U.S. at 606 (quoting **Gregg v. Georgia**, 428 U.S. 153, 163 (1976)), containing a nonexclusive list of mitigating factors, **Id.** (referring to **Proffitt v. Florida**, 428 U.S. 242 (1976)), and containing no explicit reference to mitigating factors, but requiring a jury to answer three specific questions, **Id.** (citing **Jurek v. Texas**, 428 U.S. 262, 272 (1976)). The Court stated that all three of these statutes were upheld for the reason that they did not "prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." **Id.** at 607.

Section 29-2521 of the Nebraska death penalty statutes refers to a list of aggravating and mitigating circumstances set forth in § 29-2523. However, that list is not exclusive, as stated in § 29-2521:

> In the proceeding for determination of sentence, **evidence may be presented as to any matter that the court deems relevant to sentence**, and **shall include** matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. **Any such evidence which the court deems to have probative value may be received.**

Neb. Rev. Stat. § 29-2521 (Reissue 1989) (emphasis added) (previously codified at Neb. Rev. Stat. § 29-2521 (Reissue 1975)).

Accordingly, the Nebraska Supreme Court has stated that in fixing a sentence of death or life imprisonment, what is required is "not a mere counting of aggravating and mitigating circumstances but, rather, a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment **in light of the totality of the circumstances present." State v. Joubert**, 224 Neb. 411, 425-26, 399 N.W.2d 237, 248 (1986), **cert. denied**, 484 U.S. 905 (1987) (emphasis added). **See State v. Reeves**, 216 Neb. 206, 230, 344 N.W.2d 443, 448, **cert. denied**, 469 U.S. 1028 (1984).

Rust has failed to set forth with **any** specificity either specific trial court rulings or categories of trial court rulings which allegedly limited his presentation of mitigating factors. Upon examining both the trial court record, Exhibits 3, 3(a), 3(b), 3(c) and 3(d), and the sentencing record, Exhibits 4, 4(a) and 4(b), I conclude that Rust's presentation of mitigating factors was in no way limited by either the trial court's or sentencing court's rulings. As a matter of fact, the sentencing record shows

that other than evidence of Rust's background relating to the mitigating circumstance set out in § 29-2523(2)(c) (mental or emotional disturbance), no other mitigating evidence was presented by Rust to the sentencing court. (BOE, Exhibit 4, TR 31:6-90:14).

In summary, I find: the Nebraska death penalty statutes specifically require individualized sentencing; a sentencing court is not precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; and the Nebraska statutes have been so interpreted in other cases as well as in this case. Therefore, this court finds that the Nebraska death penalty statutes are not in violation of Rust's due process and equal protection rights under the Fourteenth Amendment for the alleged failure to limit Rust's presentation of mitigating factors.

D. Notice to Defendant Regarding Aggravating Circumstances

The respondent argues that claim 12H(5) – notice to defendant regarding aggravating circumstances – is not exhausted. I disagree as I believe the matter was presented to the trial judge and the Nebraska Supreme Court in the state postconviction proceeding. (Exhibit 32, Petitioner's Amended Motion to Vacate and Set Aside ¶ 6; Exhibit 34, Motion for Rehearing ¶ VII; Exhibit 35, Brief of Appellant ¶ VI at 80-82).

Rust argues that his due process and equal protection rights under the Fourteenth Amendment have been violated because he was not provided with notice including which aggravating factors the prosecution intended to present and the evidence intended to be offered in support of such aggravating factors.

The Nebraska Supreme Court has addressed this issue:

> The specific delineation of aggravating circumstances in § 29-2523 constitutes sufficient notice to a defendant who is charged with first degree murder. The State is not constitutionally required to provide the defendant with notice as to which particular aggravating circumstance or circumstances the State will rely upon in pursuing the death penalty.

Reeves, 234 Neb. at 742, 453 N.W.2d at 379.

I am in general agreement with the Nebraska Supreme Court, but even if I were not, the evidence in this case does not support the conclusion that Rust's counsel was surprised by the position advanced by the State or the evidence offered by the State. In fact the sentencing panel was sensitive to concerns about the notice issue, and specifically advised the parties that the panel would give Rust additional time to respond to "new evidence" if the situation arose (Exhibit 4, TR 17:3-13). After Rust's counsel heard the State's evidence and argument, presented his mitigation evidence, and waited for thirty days, trial counsel found no reason why sentence should not then be imposed (BOE, Exhibit 4, TR 147:13-24). Thus, even if notice were required, the lack of notice was harmless beyond a reasonable doubt.

E. Regulation of Prosecutorial Discretion

Rust argues that the application of the Nebraska death penalty statutes, in particular Nebraska Revised Statute § 29-2519, is arbitrary and capricious and violates his rights to due process and equal protection under the Fifth, Eighth, and Fourteenth Amendments to the Constitution. More specifically, he alleges that because other cases exist wherein prosecutors have exercised their discretion to enter into a plea agreement and pursuant to the agreement the state has refrained from offering evidence as to aggravating circumstances or a defendant received a conviction other than for first degree murder, Rust has not been given due process of law and has suffered discrimination sanctioned by the Nebraska death penalty statutes.

The United States Supreme Court has stated that the availability of discretionary leniency does not render death sentences arbitrary and capricious:

> The existence of these discretionary stages [including plea bargain] is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision

> to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg, 428 U.S. at 199 (footnote omitted). The Court continued, stating that if defendant Gregg contended, for example, that plea bargains should not be allowed, the resulting system would be contrary to our system of justice and in fact unconstitutional as the result would be mandatory death sentences. **Id.** at 199 n.50.

Subsequently, citing the above-quoted passage from **Gregg**, the Court added that constitutional violations do not exist due to seemingly inconsistent results based on the objective circumstances of the crime at issue. The Court noted that the strength of the evidence, as well as witness availability, credibility and memory also affect a prosecutor's action in a particular case. The Court also stated that because state sentencing is generally discretionary, a defendant's ultimate sentence will be determined by the judgment of the sentencing body. **McCleskey v. Kemp**, 481 U.S. 279, 307 n.28 (1987).

Thus, even if one accepts as true Rust's proposition that plea bargains result in different treatment for similarly situated offenders convicted of murder, it does not follow that such different treatment was arbitrary, capricious and denied Rust due process of law. Such a proposition only suggests that in any system which has a discretionary component mercy may be granted or withheld by various actors, and, so long as the system of

imposing the death penalty accords the offender the process which he/she is constitutionally due, the Constitution, from the perspective of the Due Process Clause, is satisfied.

With regard to his equal protection claim, Rust would have to prove that "the decisionmakers in **his** case acted with discriminatory purpose." **Id.** at 292 (stating a purely statistical study of other cases was insufficient). Rust has failed to offer any such evidence. Rather, as the basis for his argument, Rust states that at one of his state postconviction hearings Mr. Richard Goos, Special Deputy, Lancaster County Public Defender's Office, testified regarding prosecutorial discretion employed in cases in which he was involved as defense counsel. Brief of Petitioner at 42-49; (Exhibit 43(a), TR 200:8-220:4). Mr. Goos' testimony certainly does not establish that the State acted with a discriminatory purpose insofar as Rust is concerned. Accordingly, there is no factual predicate for Rust's equal protection claim.[34]

Rust requests an evidentiary hearing to further "address the arbitrary and capricious application of the Nebraska death penalty statutes through the use of prosecutorial discretion." Brief of Petitioner at 42. I find that Rust was provided a full and fair opportunity at his state postconviction hearing to submit this type of evidence as evidenced by the testimony of Mr. Goos. Moreover, Rust has failed to inform this court with sufficient particularity what evidence he should now be entitled to submit. As a

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[34] At the time Kellogg was shot, Rust was an adult white male.

consequence, I find that Rust is not otherwise entitled to an evidentiary hearing. **Townsend v. Sain,** 372 U.S. 293, 313 (1963); J. Liebman, **Federal Habeas Corpus Practice and Procedure § 20.3 & .4 (1988).** Accordingly, the court denies Rust's request for an evidentiary hearing.

For the reasons discussed, the court concludes that the application of the Nebraska death statutes to Rust was not arbitrary and capricious and did not violate Rust's rights to due process and equal protection as guaranteed him by the Fifth, Eighth and Fourteenth Amendments to the Constitution.

F. Constitutionality of Specific Death Penalty Statutes

Rust argues that the following statutes are vague and that they were applied to him arbitrarily and capriciously in violation of his due process and equal protection rights under the Fourteenth Amendment: § 29-2523(1)(a), (1)(b), (1)(f), (1)(h) and (2).

The four aggravating factors found by the sentencing panel to exist in Rust's case are:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
>
> . . . .

> (f) The offender knowingly created a great risk of death to at least several persons;
>
> . . . .
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

Neb. Rev. Stat. § 29-2523(1)(a), (b), (f) and (h) (Reissue 1989) (previously codified at Neb. Rev. Stat. § 29-2523 (Reissue 1975)); (BOE, Exhibit 4, TR 152:7-161:23; Exhibit 5).

The sentencing panel found one mitigating circumstance: "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." Neb. Rev. Stat. § 29-2523(2)(c) (Reissue 1989); (BOE, Exhibit 4, TR 161:24-165:16; Exhibit 5).

Rust argues that the four aggravating factors found by the sentencing panel – (1)(a), (b), (f) and (h) – are so vague that they fail to rationally narrow the class of persons eligible for execution and therefore do not prevent arbitrary and capricious imposition of the death penalty. Rust argues that mitigating circumstance 2(a) – no significant history of prior criminal activity – is vague and that the sentencing panel's decision was arbitrary and capricious in that the panel did not find that mitigating circumstance 2(a) applied in Rust's case.

The United States Supreme Court has stated that capital sentencing procedures that allow for the imposition of the death penalty in an arbitrary and capricious manner are unconstitutional, and that the state may impose capital punishment only if the state applies its law in a manner that avoids arbitrary and capricious

infliction of the death penalty. **Furman v. Georgia,** 408 U.S. 238 (1972). The sentencer must be guided by clear and objective standards providing specific guidance and making rationally reviewable the process for imposition of the death penalty. **Gregg,** 428 U.S. at 195. Statutory guidelines must "genuinely narrow" the class of persons eligible for the death penalty and "reasonably justify" the imposition of the death penalty on a particular defendant as compared to a lesser penalty for others found guilty of murder. **Zant v. Stephens,** 462 U.S. 862, 877 (1983). Therefore, the ultimate issue in a case involving a challenge to a death penalty statute is whether the imposition of statutory aggravating circumstances renders the sentencing system invalid because the statutory scheme allows for the arbitrary and capricious imposition of the death penalty. **Gregg,** 428 U.S. at 195. If the statute is vague but the state supreme court's interpretation thereof has sufficiently narrowed the statute's meaning, the statute may be constitutional. **Id.** at 202. I turn then to the specific complaints of Rust.

1. Section 29-2523(1)(a)

Aggravating circumstance 1(a) provides: "**The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person,** or has a substantial history of serious assaultive or terrorizing criminal activity." § 29-2523(1)(a) (emphasis added). Only the first prong was found to exist in Rust's case, as he was previously convicted of the related crimes of intent to inflict great bodily harm and grand larceny. (BOE, Exhibit 4, TR 152:11-154:19; Exhibit 5, at 3). In

finding that the conviction for assault with intent to inflict great bodily harm constituted a crime involving the use of violence to the person, the sentencing panel stated:

> The crimes involved the theft of a friend's automobile, after the defendant threatened the victim with a bayonet and his companion held the victim with a chain around his neck.
>
> The defendant drove the victim's automobile to a remote area near Sioux Falls, where the victim was removed from the car, and the defendant struck him about the head with a bayonet handle and a tire iron until he was unconscious.
>
> The defendant and his companion then robbed the victim and dumped him, bleeding and semi-conscious, into the trunk of his automobile and drove away.
>
> The victim was able to escape from the trunk of the moving automobile and was treated at a hospital. Seventeen stitches were required to close the wounds inflicted.

(BOE, Exhibit 4, TR 153:1-19; Exhibit 5, at 3).

The Nebraska Supreme Court has interpreted the first prong of § 29-2523(1)(a) on numerous occasions. **See, e.g., Ryan,** 233 Neb. at 135, 444 N.W.2d at 648. In **State v. Stewart,** 197 Neb. 497, 250 N.W.2d 849 (1977), **overruled on other grounds, State v. Palmer,** 224 Neb. 282, 399 N.W.2d 706 (1986), **cert. denied,** 484 U.S. 872 (1987), the court held that aggravating circumstance "a" should apply only to criminal activity conducted prior to the events out of which the murder charge arose. **Id.** at 520,

250 N.W.2d at 863. In **Rust I,** 197 Neb. at 528, 250 N.W.2d at 867, the court determined that aggravating circumstance "a" applied where the defendant had a prior conviction for assault with intent to inflict great bodily harm. **Id.** at 535, 250 N.W.2d at 872-73. And in **State v. Bird Head,** 225 Neb. 822, 408 N.W.2d 309 (1987), the court agreed with the sentencing panel that aggravating circumstance "a" could be proved by either establishing prior convictions for " 'another murder or crime involving the use of threat or violence to the person,' " **or** by showing that the defendant has a " 'substantial history of serious assaultive or terrorizing criminal activity.' " **Bird Head,** 225 Neb. at 836, 408 N.W.2d at 319 (quoting § 29-2523(1)(a)). And in **State v. Williams,** 217 Neb. 539, 352 N.W.2d 538 (1984), the court stated that the " 'definition of aggravating circumstance (a) is clear,' " **id.** at 545, 352 N.W.2d at 542 (quoting **Rust I,** 197 Neb. at 535, 250 N.W.2d at 873).

Under the standards set forth by the United States Supreme Court, I find that § 29-2523(1)(a) is not vague and that it was not arbitrarily and capriciously applied to Rust.

2. Section 29-2523(1)(b)

Aggravating circumstance "b" provides: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." § 29-2523(1)(b). The sentencing panel found that the murder of Kellogg was committed by Rust to conceal the commission of the crime and to

conceal his identity. Specifically, the sentencing panel stated:

> The evidence conclusively establishes that at the time of the murder of Michael Kellogg, the defendant was attempting to escape capture after participating in an armed robbery of a supermarket at 30th and Weber in Omaha, Nebraska; and after having engaged in a running gun battle with Officers of the Omaha Police Department, during which time, he fired numerous shots at Police Officers George Allen and Joseph Nepodal.
>
> During the murder of Michael Kellogg, the defendant shot and wounded Police Officer Russell Wolf.
>
> Concurrently with his trial for murder, he was convicted of three Counts of Shooting with Intent to Kill, Wound or Maim the three Police Officers.

(BOE, Exhibit 4, TR 154:24-155:15).

In **Rust I,** however, the Nebraska Supreme Court found that while the murder of Kellogg was committed to conceal the identity of Rust[35], it was not committed to

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[35] However, as the magistrate judge previously pointed out in detail, (Filing 55, at 76-96), and as I agreed, this prong was not proven beyond a reasonable doubt. Nothing stated in this memorandum opinion is intended to alter this previous finding and conclusion or any other previous findings and conclusions in this case. In particular, nothing stated in this memorandum opinion is intended to find as fact or conclude as law that the evidence was sufficient to conclude beyond a reasonable doubt that any aggravating circumstance was proven. In addition, I

conceal the crime. **Id.** at 197 Neb. at 537; 250 N.W.2d at 873.

The Nebraska Supreme Court has interpreted the word "apparent" in the context of § 29-2523(1)(b) as follows: " 'Apparent' " means " 'readily perceptible,' " and therefore " 'the provision cannot be applied in speculative situations or where a strained construction is necessary to fulfill it.' " **Reeves,** 234 Neb. at 754, 453 N.W.2d at 385-86 (quoting **Holtan v. Black,** No. 84-L-393, slip op. at 20, 1986 WL12479 (D. Neb. Nov. 5, 1986), **vacated on other grounds,** 838 F.2d 984 (1988)). The Nebraska Supreme Court found that aggravating circumstance "b" is not constitutionally vague. **Id.** at 754, 453 N.W.2d at 386.

The Nebraska Supreme Court has also affirmed on numerous occasions the decisions of sentencing courts with regard to aggravating circumstance "b." **Id.; State v. Reeves,** 239 Neb. 419, 435, 476 N.W. 829, 840 (1991); **State v. Otey,** 236 Neb. 915, 928-29, 464 N.W.2d 352, 361-62, **cert. denied,** 111 S. Ct. 2279 (1991); **Reeves,** 234 Neb. at 754, 453 N.W.2d at 385-86; **Joubert,** 224 Neb. at 426-27, 399 N.W.2d at 248-49; **State v. Palmer,** 224 Neb. 282,

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need not reach the question of whether aggravating circumstance "b" could be proven simply by proof that the offender was escaping at the time of the commission of the murder as I do not understand the respondent to urge such a construction of the statute. Brief of Respondent at 26. I, therefore, understand the statute to require something more than proof that the offender was escaping at the time the murder took place in order to establish that the murder was committed to conceal the identity of the perpetrator pursuant to aggravating circumstance "b."

309-10, 399 N.W.2d 706, 726 (1986), **cert. denied,** 484 U.S. 872 (1987); **State v. Hunt,** 220 Neb. 707, 725, 371 N.W.2d 708, 720-21 (1985), **overruled on other grounds, State v. Palmer,** 224 Neb. 282, 399 N.W.2d 706 (1986), **cert. denied,** 484 U.S. 872 (1987); **Reeves,** 216 Neb. at 225, 344 N.W.2d at 445; **State v. Peery,** 199 Neb. 656, 673, 261 N.W.2d 95, 104 (1977), **cert. denied,** 439 U.S. 882 (1978).

Under the standards set forth by the United States Supreme Court, I conclude that § 29-2523(1)(b) is not vague and that it was not arbitrarily and capriciously applied to Rust.[36]

3. Section 29-2523(1)(f)

Aggravating circumstance provides: "The offender knowingly created a great risk of death to at least several persons." § 29-2523(1)(f). The sentencing panel, finding that aggravating circumstance "f" existed "to a great degree" (BOE, Exhibit 4, TR 160:11), stated:

> The evidence established that defendant fired repeatedly at Police Officers Allen, Nepodal and Wolf, using a sawed-off shotgun and shells loaded with deer slugs, and a Beretta 32-caliber automatic pistol.
>
> Shots were fired by defendant and his co-defendant Ronald Raymond Ell at Officer Allen's Police Car over a chase extending a number of blocks in a heavily populated residential area of Omaha.

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[36] But see footnote 29.

> The windshield of Officer Allen's car was pierced twice by shots from the fleeing robbers, narrowly missing Officer Allen.
>
> The inference seems to be clear, that the defendant was shooting at Officer Allen and not at his car.
>
> Two Police Cruisers were struck by gunfire.
>
> Officer Allen received a head wound.
>
> The defendant shot repeatedly at Officers Allen and Nepodal after the robbers' was [sic] trapped in Iowa Street during a time when bystanders were numerous.
>
> The defendant shot both Michael Kellogg and Officer Wolf while hiding in the yard of a residence.
>
> Residents in their homes were subjected to great risk of being struck by stray gunfire.
>
> The defendant knowingly created a great risk of death to at least three Police Officers and many other civilians.
>
> He demonstrated an utter disregard for human life, and a willingness to shoot and kill anyone who got in the way of his escape.

(BOE, Exhibit 4, TR 158:22-160:9).

Aggravating circumstance "f" has not been interpreted by the Nebraska Supreme Court. But the words of aggravating circumstance "f" are clear and precise.

Under the standards set forth by the United States Supreme Court, this court concludes that § 29-2523(1)(f)

is not vague and was not arbitrarily and capriciously applied to Rust.[37]

4. Section 29-2523(1)(h)

Aggravating circumstance 29-2523(1)(h) provides: "The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." § 29-2523(1)(h).

In finding that aggravating circumstance "h" applied, the sentencing panel stated:

> The murder was committed during an attempt to escape from the crime of armed robbery.
>
> Many Officers of the Omaha Police Department were carrying out their duty as law enforcement officers in a massive effort to apprehend and arrest the defendant and his companions.
>
> Michael Kellogg joined in that effort.
>
> The conduct of the defendant in committing the murder of Michael Kellogg was a direct attempt to disrupt and hinder the lawful exercise of a proper governmental function.

(BOE, Exhibit 4, TR 161:7-21).

The application of aggravating circumstance "h" has been affirmed by the Nebraska Supreme Court. **State v. Reynolds,** 235 Neb. 662, 695, 457 N.W.2d 405, 425 (1990). The words of aggravating circumstance "h" are clear.

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[37] But see footnote 29.

Under the circumstances set forth by the United States Supreme Court, this Court concludes that § 29-2523(1)(h) is not vague and was not arbitrarily and capriciously applied to Rust.[38]

5. Section 29-2523(2)(a)

Mitigating circumstance (2)(a) provides: "The offender has no significant history of prior criminal activity." § 29-2523(2)(a).

Rust argues that the phrases "no significant history" and "prior criminal activity" are vague. As Rust was denied the application of aggravating circumstance (2)(a), he argues that the decision of the sentencing panel in this regard was arbitrary and capricious. Brief of Petitioner at 52-53.

The sentencing panel summarized Rust's prior criminal activity (BOE, Exhibit 4, TR 152:18-154:12; Exhibit 5, at 3), and found that "[i]t constitutes a significant history of prior criminal activity." (BOE, Exhibit 4, TR 162:5-6; Exhibit 5, at 7). As noted previously, Rust's criminal history included a South Dakota conviction when Rust was an adult for assault with intent to inflict great bodily harm and grand larceny.

The Nebraska Supreme Court has specifically and thoroughly analyzed the phrase "prior criminal activity." **Reeves,** 234 Neb. at 721-35, 453 N.W.2d at 368-75 (holding constitutionally permissible the consideration of unadjudicated misconduct in determining the existence or

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[38] But see footnote 29.

nonexistence of mitigating circumstance 2(a), where the defendant has the opportunity to rebut the charges). In this case the "criminal activity" relied upon by the sentencing panel included only adjudicated matters.

The Nebraska Supreme Court has reviewed sentencing courts' conclusions with regard to the existence or nonexistence of mitigating circumstance 2(a), thereby providing direction as to what sort of conduct is to be considered "significant history." **Otey,** 236 Neb. at 926-27, 464 N.W.2d at 360-61; **State v. Victor,** 235 Neb. 770, 794, 457 N.W.2d 431, 447 (1990), **cert. denied,** 111 S. Ct. 1091 (1991); **Palmer,** 224 Neb. at 282, 399 N.W.2d at 732. Recently the Nebraska Supreme Court made clear that significant history may include "rather petty and nonviolent" crimes such as marijuana possession, insufficient-funds checks, and disturbing the peace. **Reeves,** 239 Neb. at 433, 476 N.W.2d at 839-40.

Having reviewed Rust's prior criminal activity as well as the Nebraska Supreme Court's interpretation of mitigating circumstance 2(a), under the standards set forth by the United States Supreme Court, this court finds that mitigating circumstance 2(a) is not vague. This court further finds that the action of the sentencing panel in finding that mitigating circumstance 2(a) did not exist was not arbitrary and capricious.

G. Summary

In conclusion, I find that the Nebraska death penalty statutes, Neb. Rev. Stat. § 29-2519, **et seq.,** (Reissue 1989) (previously codified at Neb. Rev. Stat. § 29-2519, **et seq.,**

(Reissue 1975)), are not vague or overbroad, were not applied arbitrarily and capriciously, and therefore are not unconstitutional as alleged.

VIII. Comparative Review of a Sentence of Death – Claim 12I

Rust maintains that the Nebraska Supreme Court has violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution in that the court has failed to review his death sentence in accordance with § 29-2521.03 of the Nebraska Revised Statutes. This section became law in 1978, after Rust's appeal was final. L.B. 711, 85th Sess., 1978 Neb. Laws 621. Section 29-2521.03 provides:

> **Criminal homicide cases; appeal; sentence; Supreme Court review.** The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

Neb. Rev. Stat. § 29-2521.03 (Reissue 1989).

In essence, Rust argues that this statute should be applied retroactively to him and that if it is so applied, he is entitled to relief. Rust argues that the following statement by the Nebraska Supreme Court should be interpreted to allow him a review under § 29-2521.03:

> Under the provisions of 1978 Neb. Laws, L.B. 711, codified as part of Chapter 29, article 25 (Reissue 1978), this court must conduct its own review to determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in cases with the same or similar circumstances. We now construe § 29-2521.03 to require an extensive review and analysis of all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal.

Reeves, 216 Neb. at 230, 344 N.W.2d at 448. The conviction and sentence in **Reeves** took place after § 29-2521.03 was enacted. **Compare id.** at 208, 344 N.W.2d at 438 (stating the offense took place in 1980) **with** § 29-2521.03 (enacted in 1978).

The Nebraska Supreme Court has final authority to interpret Nebraska statutes, and this court is bound by the Nebraska Supreme Court's interpretation of penal statutes. **Davis v. State,** 1992 U.S. App. LEXIS 3965, at *6 (8th Cir. Mar. 11, 1992); **Harper v. Grammer,** 654 F. Supp. 515, 538 (D. Neb. 1987), **aff'd,** 895 F.2d 473 (8th Cir. 1990).

The Nebraska Supreme Court has clearly stated that § 29-2521.03 is not retroactive. **State v. Peery,** 223 Neb. 556, 567, 391 N.W.2d 566, 574 (1986) (stating the comparative review mandated by § 29-2521.03 does not apply retroactively); **Rust III,** 223 Neb. at 158, 388 N.W.2d at 491 (stating comparative review was denied because the petitioner's judgment and sentence were final before § 29-2521.03 was enacted, comparing the petitioner's situation with that in **Reeves,** and stating, "[t]he comparative review required by § 29-2521.03 does not apply to a death

sentence which was imposed and became final prior to the effective date of the statute); **State v. Holtan,** 205 Neb. 314, 316, 287 N.W.2d 671, 673 (stating § 29-2521.03 does not apply where the judgment and sentence were imposed and became final prior to the date when § 29-2521.03 became effective), **cert. denied,** 449 U.S. 891 (1980).

In this case, Rust was sentenced on October 30, 1975 (Exhibit 5). Section 29-2521.03 was enacted in 1978, after Rust's judgment and sentence became final. As the Nebraska Supreme Court has clearly stated that § 29-2521.03 is not retroactive where a conviction and sentence have been imposed and made final before the effective date of the statute, Rust's argument that he is entitled to comparative review under § 29-2521.03 is without merit.

Moreover, the United States Supreme Court has stated that where safeguards such as statutory aggravating circumstances exist, proportionality review is not constitutionally required. **Pulley v. Harris,** 465 U.S. 37, 50 (1984). Therefore, Rust's argument that he is constitutionally entitled to comparative review under § 29-2521.03 is also without merit.

IX. Appellate Issues Not Addressed – Claim 12K

Rust complains the Nebraska Supreme Court improperly determined that he did not appeal his conviction on the three counts of shooting with intent to kill, wound, or maim. As Rust points out, a notice of appeal on these three counts was filed November 25, 1975.

(Exhibit 55). In **Rust I,** 197 Neb. at 531, 250 N.W.2d at 870, the Nebraska Supreme Court concluded that "[n]o appeal has been taken on the other three counts." It thus appears that the Nebraska Supreme Court was incorrect.

Rust brought this error to the attention of the Nebraska Supreme Court in his motion for rehearing and brief in support thereof. (Exhibit 9, at 5). It is undisputed that the Nebraska Supreme Court summarily denied the motion for rehearing. Rust argues that he was denied due process of law as a result of his treatment by the Nebraska Supreme Court in this regard. I disagree.

In Nebraska, an appeal is automatic upon imposition of the death penalty. In response to the automatic appeal, Rust submitted an extensive brief in which he did not differentiate between the appeal from the death sentence and any other appeal. (Exhibit 6). Indeed, in Rust's "statement of the case" there is no effort to apprise the Nebraska Supreme Court that he intended to brief his conviction on the count which gave rise to the death sentence separately from his convictions on the other three counts. While much of Rust's brief is, of course, addressed to matters which pertain exclusively to the death sentence, other assignments of error pertain to the conviction which gave rise to the death sentence as well as to the other convictions. (Exhibit 6, Assignments of Error at 2-3). The same is true of the propositions of law. (Exhibit 6, at 4-7). Accordingly, it appears Rust fully briefed all matters before the Nebraska Supreme Court. The Nebraska Supreme Court gave serious consideration to Rust's appeal in **Rust I.**

Rust does not claim he had any information he wished to present to the Nebraska Supreme Court which the court had not already considered in his original brief. As a matter of fact, a review of Rust's motion for rehearing and brief in support thereof (Exhibit 9) reveals that Rust made no claim that he had anything new to argue to the Nebraska Supreme Court that had not already been the subject of his original appellate brief. In this court, Rust makes no claim that he had anything of substance to tell the Nebraska Supreme Court about the other three counts which the court had not previously been told in his original appellate brief. Under the circumstances, therefore, the error was harmless beyond a reasonable doubt, assuming for the sake of argument that the error implicated a federal constitutional right. **See Chapman v. California,** 386 U.S. 18, 23-24 (1967).

X. Summary

Accordingly, I shall enter judgment providing that:

1. The amended petition (Filing 31) is granted in part as to Claim 12A and Claim 12B(11), (12), (35), (36), (37), and is otherwise denied; and

2. Judgment is entered in favor of the Petitioner and against the Respondent providing that the Petitioner's sentence shall be reduced to life imprisonment, unless, within sixty (60) days after the date of the entry of this judgment, the Respondent initiates capital resentencing proceedings.

DATED this 18 day of June, 1992.

BY THE COURT:

/s/ W. G. Cambridge
William G. Cambridge
United States District Judge